APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15337
D.C. No. CV-05-000125-DAE

[Filed January 14, 2008]

Sally A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; Ralph James Mitchell; Lucy Mitchell; Noosha Fesharaki; Earl Kidder; Jeenie Marie Kidder; James Rapisarda; Jonathan Von Brana; Thomas Preston; Loren Hohman; Herbert Caplan; Elena Pecile, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; Wilma Parker, Trustee of the Wilma I. Parker Trust dated March 16, 1989 as amended; Troy Williams; Larry Weisner; Delores Weisner; Marianne Marion Jaeger; Richard Johnson; William Garrett Fuson; Kang Yuk Lee; Suk Ja Lee; Claude Rothe, Trustee of the Claude R. Rothe Living Trust dated March 26, 1998; Alvin Olson, Trustee under Alvin R. Olson Revocable Trust Agreement dated July 20, 1998; Natalia Indrasari; Warren Sweet, Trustee of the Sweet John Revocable Trust dated June 21, 1991; Rheba Alice Sweet; Robert Mehring; Ayumi Watanabe Mehring; Arnold Flemmings;

Mariana Flemmings, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; Melvin Takeo Matsuoka; Delwin Schneider; Katherine Schneider, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; Ronald Silverman; Farhad Simyar; Frank Winston Kern,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
November 2, 2007 – Honolulu, Hawaii

Filed January 14, 2008

Before: DIARMUID F. O'SCANNLAIN, A. WALLACE TASHIMA, and MILAN D. SMITH, JR., Circuit Judges.

COUNSEL

David A. Nakashima, Alston Hunt Floyd & Ing, Honolulu, Hawaii, argued the cause for the plaintiffs-appellants, and filed briefs; Lerisa L. Heroldt

and Clyde J. Wadsworth, Alston Hunt Floyd & Ing, Honolulu, Hawaii, were on the briefs.

Don S. Kitaoka, Deputy Corporation Counsel, City and County of Honolulu, Hawaii, argued the cause for the defendant-appellee and filed a brief; Carrie K.S. Okinaga, Corporation Counsel, Paul M. Iguchi and Derek T. Mayeshiro, Deputy Corporation Counsels, City and County of Honolulu, Hawaii, were on the briefs.

OPINION

O'SCANNLAIN, Circuit Judge.

We are called upon to determine whether the United States Constitution imposes any limit on the City of Honolulu's power to repudiate a contract to convey property to a private citizen in connection with its leasehold conversion program.

I

A

In 1991, the City and County of Honolulu (the "City") enacted an ordinance, later codified at Chapter 38 of the Revised Ordinances of Honolulu ("Chapter 38"), which created a mechanism allowing owners of leasehold interests in condominium units to convert their leasehold interests into fee interests by using the

City's power of eminent domain.[1] We upheld the constitutionality of Chapter 38 in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995). As we explained in that case, Chapter 38 was a response to Hawaii's long history of feudal land ownership, which survived well after American acquisition. *Id.* at 1153. At the time of Chapter 38's enactment, a small handful of landowners owned the vast majority of land in the State. Despite the efforts of Hawaii's leaders to divide these large Hawaiian land estates, the system persisted, driving the price of land in Hawaii to exorbitant heights. Taking advantage of this status quo, Hawaiian landowners rarely sold their estates. Instead, they frequently leased their land for long terms, often to developers who would construct condominiums on the property and then sell the units subject to the ground lease. *Id.* at 1153-54.

To break up this pattern and to increase the opportunity for land ownership, the City enacted Chapter 38. Chapter 38 provided that when a sufficient number of condominium unit owners within a condominium complex applied, the City would take steps to acquire the property on which their condominium complex was built from the landowner by power of eminent domain. The City would then convey each condominium unit and the appurtenant land to the lessee-applicants in fee simple.

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[1] The Hawaii Legislature has delegated the power of eminent domain to local bodies such as the City. Haw. Rev. Stat. § 46-1.5(6) (2006).

Specifically, Chapter 38 required an application from a minimum of either 25 condominium owners within a development or the owners of at least 50% of the condominium units within the development to trigger its condemnation mechanism. Revised Ordinances of Honolulu § 38-2.2(a)(1). Upon such application, the City's Department of Housing and Community Development (the "Department") would hold a duly-noticed public hearing to determine whether the acquisition of the property though eminent domain would "effectuate public purposes" as defined in Chapter 38. *Id.* § 38-2.2(a)(2). If the Department issued a finding answering that question in the affirmative, the Department would initiate condemnation proceedings unless the landowner agreed to convey the fee interests to the lessee-applicants directly. *Id.* Finally, before condemnation could begin, the City Council was required to adopt a resolution approving the exercise of eminent domain and appropriating the necessary funds to pay just compensation. *Id.*; City & County of Honolulu Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion § 2-12.

B

Sally Matsuda and the other appellants in this suit (the "Lessees") hold leasehold interests in condominium units at the Discovery Bay condominium complex in Honolulu, Hawaii. The Lessees applied to the City under Chapter 38 to convert their leasehold interests into fee simple interests in their units and the appurtenant land. Upon receipt of the Lessees' applications, the City entered into individual written

contracts with each Lessee in which the Lessee promised to pay the City $1,000 in exchange for the City's promise that, upon its successful acquisition of the property at Discovery Bay, the City would convey a fee interest to each Lessee in her unit and the appurtenant land. Each contract was expressly conditioned on the City's successful acquisition of the property pursuant to Chapter 38, and each party agreed to use its best efforts to effectuate the acquisition.

On July 3, 2004, after a duly-noticed public hearing, the Department announced its finding that condemnation of the property at Discovery Bay would serve the public purpose required by Chapter 38. A few months later, in late October or early November, the Lessees received written notice of their final approval to proceed with Chapter 38's leasehold conversion procedure. Finally, on November 24, the Department designated the Lessees' leasehold interests in the real property and other common elements at Discovery Bay for acquisition through the City's exercise of eminent domain, finding that the Lessees had satisfied Chapter 38's numerosity requirement, that the condemnation would effectuate the public purpose of Chapter 38, and that no agreement for a voluntary sale by the landowner had been made.

As the Lessees' application was progressing, however, the Honolulu City Council began considering a proposed bill that would repeal Chapter 38. As the proposed bill's statement of purpose explained, some members of the Council had determined that Chapter 38's goal of "provid[ing] affordable housing" and "strengthen[ing] the economy through fee ownership"

had largely been satisfied, rendering the provision unnecessary.

On November 10, 2004, a councilmember introduced a measure seeking a City Council resolution to approve the initiation of condemnation proceedings at Discovery Bay. Even though the Lessees' applications had met all the requirements of Chapter 38, the Council deferred consideration of the resolution pending the possible repeal of Chapter 38.

On January 26, 2005, the Council enacted Ordinance 05-001, repealing Chapter 38. The ordinance permitted any condemnation proceeding approved by City Council resolution before the effective date of the repeal to continue, but because the City Council never took such a step to approve the condemnation of the property at Discovery Bay, the project failed.

The Lessees filed suit against the City in the district court, arguing that Ordinance 05-001 violated the Contracts Clause, the Fourteenth Amendment's Due Process Clause, and 42 U.S.C. § 1983, and seeking declaratory and injunctive relief.[2] Shortly thereafter, the Lessees moved for a preliminary injunction to enjoin the implementation of the ordinance, which the district court denied. The Lessees then filed a motion for summary judgment, which the district court denied as well, granting summary judgment in favor of the

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[2] The Lessees also argued that the ordinance was an unconstitutional bill of attainder, U.S. Const. art. I, § 10, a claim they do not raise on this appeal.

City instead. *Matsuda v. City and County of Honolulu*, 378 F. Supp. 2d 1249 (D. Haw. 2005). The district court concluded that the Lessees could not challenge Ordinance 05-001 under the Contracts Clause because the Lessees' contracts with the City were unenforceable. It reasoned that the "reserved powers" doctrine precluded the City from entering into the contracts because they purported to limit the City's discretion over the use of its eminent domain power, a power which has been labeled an "essential attribute of sovereignty." *Id.* at 1255 (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996)).

The Lessees timely appeal.

II

We begin with the Lessees' claim that Ordinance 05-001 impaired their contracts with the City in violation of the Contracts Clause of the United States Constitution. The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Despite the sweeping terms of its literal text, the Supreme Court has construed this prohibition narrowly in order to ensure that local governments retain the flexibility to exercise their police powers effectively. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978); *El Paso v. Simmons*, 379 U.S. 497 (1965); *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934). Nevertheless, when a state's action interferes with its own contractual obligations, as opposed to mere private contracts, the Court has made clear that we are to examine the state's conduct with a higher level of

scrutiny.[3] *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 20-21 (1977).

Under this heightened scrutiny test, first announced in *U.S. Trust,* we consider (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship," *Energy Reserves Group, Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411 (1983) (citations and internal quotation marks omitted); (2) whether the state law is justified by a "significant and legitimate public purpose," *id.*; and (3) whether the impairment resulting from the law is both "reasonable and necessary to fulfill [such] public purpose," *S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885, 889-90 (9th Cir. 2003) (per curiam) (citations and internal quotation marks omitted).

In the case before us, however, the district court did not apply the *U.S. Trust* test to the Lessees' Contracts Clause claim, concluding instead that heightened scrutiny was not appropriate because the reserved powers doctrine rendered the Lessees' contracts with the City void *ab initio. Matsuda,* 378 F. Supp. 2d at 1255.

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[3] The Contracts Clause applies to a municipality such as the City. *See Rui One Corp. v. City of Berkeley,* 371 F.3d 1137, 1141, 1147 (9th Cir. 2004).

A

[1] The reserved powers doctrine is a label the Supreme Court has applied to describe the uncontroversial proposition that a state may not enter a contract that "surrenders an essential attribute of its sovereignty" and that, as a consequence, the Contracts Clause may not be used to compel a state to adhere to a contract that purports to achieve such a result. *U.S. Trust,* 431 U.S. at 23. Although a complete list of the essential attributes of sovereignty which may not be contracted away has never been established, it is well-settled that "a State cannot be bound by a contract forbidding the exercise of its police power," *U.S. Trust,* 431 U.S. at 24 n. 21, 97 S.Ct. 1505 (citing *Stone v. Mississippi,* 101 U.S. 814, 817 (1880)), and that "a State cannot contract away [its] power of eminent domain," *id.*(citing *West River Bridge Co. v. Dix,* 47 U.S. 507 (1848)).

[2] Despite this, most contracts in which a state agrees to limit its power to act in the future will not be subject to prohibition. *Id.* at 24-25. Indeed, as "the Court has regularly held," a state will be bound by contracts that limit the use of its taxing and spending powers, even though such contracts limit the state's future exercise of discretion in material ways. *Id.*

In turning to the question of whether the City's contracts with the Lessees in this particular case are subject to the reserved powers doctrine, we note that the Supreme Court has explained that our initial task is to determine whether the state had the "power to create irrevocable contract rights in the first place." *Id.* at 23. The City argues that it did not, because these

contracts purport to limit its discretion over its essential power of domain. The Supreme Court has twice decided cases in which a Contracts Clause claim implicated a state's power of eminent domain, as the City argues has occurred here, and so, we examine those precedents.

In *West River Bridge,* a corporation received a charter from the State of Vermont which entitled it to operate a toll bridge across a river and to collect tolls from passengers. 47 U.S. at 530. Several years later, the State initiated condemnation proceedings which extinguished the corporation's franchise and converted the bridge into a free public highway. *Id.* at 531. Just compensation was assessed. *Id.* The corporation asserted a Contracts Clause claim, which the Court rejected, concluding that the Constitution did not prohibit the State from using its eminent domain power, even where the property taken was previously conveyed by the State. *Id.* at 532-33. As the Court explained, all contracts, whether they are between a state and a private actor or private actors alone, are made subject to the understanding that the state may one day take the subject property for public use, provided that just compensation is paid. *Id.*

A similar situation arose in *Contributors to Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20 (1917). In that case, a hospital entered a contract with the State of Pennsylvania which resulted in a state statute specifically forbidding the State from opening any street or alley on hospital grounds without the hospital's consent. *Id.* at 21. Several years later, however, the City of Philadelphia, through the power conferred upon it by the State, initiated

condemnation proceedings against the hospital's land for the purpose of opening a public street. *Id.* at 21-22. The hospital asserted a Contracts Clause claim, which the Court again rejected, concluding that, regardless of Pennsylvania's promise to the hospital, states lack the power to divest themselves of their right to perform "essential governmental duties" such as exercising the power of eminent domain when a public need so requires. *Id.* at 23-24.

[3] *West River Bridge* and *Contributors to Pennsylvania Hospital* stand for the proposition that the Contracts Clause cannot be used to bind a state to a contract that prevents it from exercising its power of eminent domain. Yet such facts have not been alleged here. In this case, the Lessees have not accused the City of impairing its contracts with them by exercising its power of eminent domain to take for public use property which it previously conveyed to the Lessees. Instead, the Lessees accuse the City of reneging on its contractual promise to use its best efforts to effectuate a condemnation proceeding against the property at Discovery Bay and, if successful, to convey the property to the Lessees. Accordingly, we find the Lessees' claim to be distinct from those Contracts Clause claims to which the Supreme Court has applied the reserved powers doctrine in the past.

The district court held otherwise, concluding that the contracts at issue required the City to exercise its eminent domain power and that "[a] contract *requiring* a sovereign to exercise the power [of eminent domain] is just as limiting as a contract prohibiting it from

doing so." *Matsuda*, 378 F. Supp. 2d at 1257 (emphasis added).[4] We disagree.

As an initial matter, the City's contracts with the Lessees did not expressly require the City to condemn the property at Discovery Bay. As discussed above, Chapter 38 imposed several requirements for a successful condemnation which were beyond the City's power to control, and the City only agreed to use its best efforts to achieve those results. Thus, if an insufficient number of condominium owners applied to the City or if the public hearing held by the Department failed to produce a finding that condemnation would serve a valid public purpose, the City would not have been obligated under the contracts to proceed with the condemnation.

[4] More importantly, however, the City's contracts with the Lessees do not restrict its ability to exercise its eminent domain power in any way. The contracts reflect the City's voluntary undertaking to use its best efforts to effect a condemnation of the property at Discovery Bay and to convey that property to the Lessees if successful. The contracts do not purport to

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[4] The district court drew support for this conclusion from *Kelo v. City of New London*, 545 U.S. 469 (2005). As the district court noted, *Kelo* emphasized that states remain free to impose limitations on their own exercise of any power, including the takings power, stricter than the limitations required by the United States Constitution. *Id.* at 489, 125 S.Ct. 2655. Yet *Kelo* provides no guidance regarding the question presented here: whether a state actor's contract to convey property if successfully acquired through eminent domain is subject to *U.S. Trust*'s heightened scrutiny analysis or is void on its face.

require the City to refrain from the exercise of any sovereign power, including the power of eminent domain.[5] Instead, the contracts reflect the City's decision to initiate proceedings to exercise its power of eminent domain over the property at Discovery Bay, and to convey the property to the Lessees if successful. This is not the type of agreement to which the reserved powers doctrine applies and, accordingly, we conclude that *U.S. Trust*'s heightened scrutiny test provides the mandatory analysis.[6]

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[5] Indeed, there is no provision in the contracts that purports to prevent the City from conveying the property to the Lessees and later taking the property for public use. Thus, these contracts contain none of the same elements the Court found unenforceable in *West River Bridge* and *Contributors to Pennsylvania Hospital.*

[6] Indeed, as a survey of our Contracts Clause jurisprudence indicates, Ordinance 05-001 is quite analogous to the state actions this court and the Supreme Court have assessed under *U.S. Trust. See U.S. Trust,* 431 U.S. at 1518 (holding that concurrent and parallel New York and New Jersey statutes that retroactively repealed a covenant between the States and bondholders in the state-owned Port Authority was subject to Contracts Clause analysis); *Winstar,* 518 U.S. at 888-89 (concluding that a congressional statute that prohibited federal entities from complying with their contracts to provide various financial institutions with certain accounting treatment was subject to the Contracts Clause and that the reserved powers doctrine did not relieve the federal government from liability); *Cayetano,* 336 F.3d at 1099 (determining that a Hawaii statute that repealed the payroll system for state employees agreed to under a collective bargaining agreement and implemented a new system in its place was subject to a Contracts Clause claim).

B

[5] Turning to the *U.S. Trust* test, our first inquiry is whether Ordinance 05-001 "operated as a substantial impairment of a contractual relationship." *Cayetano,* 183 F.3d at 1101 (quoting *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) (internal quotation marks omitted)). The Supreme Court has subdivided this inquiry into three separate questions: (1) "whether there is a contractual relationship"; (2) "whether a change in law impairs that contractual relationship"; and (3) "whether the impairment is substantial." *Seltzer v. Cochrane,* 104 F.3d 234, 236 (9th Cir. 1996) (quoting *Gen. Motors Corp.,* 503 U.S. at 181).

[6] The parties do not dispute that a contractual relationship existed prior to the enactment of Ordinance 05-001. Turning to the questions of whether the ordinance impaired that contractual relationship and whether such impairment was substantial, the parties are in disagreement and the record is not fully developed.[7] Whether there was a substantial impairment is precisely the question *U.S. Trust* instructed the district court to answer in the first step of its analysis. Because the district court determined that the reserved powers doctrine rendered the City's contracts unenforceable, it never reached this

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[7] The contracts were "expressly conditioned" upon the City's successful acquisition of the property, but it is unclear whether the repeal of Chapter 38 under a mechanism such as Ordinance 05-001 was contemplated under the agreement, although as the City conceded at oral argument, the City was, at minimum, under an implied duty of good faith and fair dealing.

threshold question. We believe this analysis is most appropriate for the district court to engage in on remand as a matter of first impression.

[7] Accordingly, we vacate the district court's grant of summary judgment to City on the Lessees' Contracts Clause claim and remand to allow the district court to consider the Lessees' claim under the framework set forth in *U.S. Trust.*

III

[8] Having addressed the Lessees' Contracts Clause claim, we next turn to their contention that Ordinance 05-001 violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. We have held that contracts such as the Lessees' may give rise to property interests protected by this provision. *See Brewster v. Bd. of Educ.*, 149 F.3d 971, 982-83 (9th Cir. 1998). Further, the Due Process Clause confers both procedural and substantive rights. *Richardson,* 124 F.3d at 1162 (citing *United States v. Salerno,* 481 U.S. 739, 746 (1987)). In evaluating a substantive due process claim such as the Lessees', we have determined that state action which "neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights" will violate substantive due process only if the action is "not rationally related to a legitimate governmental purpose." *Id.* (quoting *Munoz v. Sullivan,* 930 F.2d 1400, 1404 (9th Cir. 1991)).

[9] The burden this places on the plaintiff is "extremely high." *Id.* (citing *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir. 1990)). To prove that the City's enactment of Ordinance 05-001 violated their substantive due process rights, the Lessees must demonstrate first that their contracts were the type of property the Due Process Clause protects and, second, that the City deprived them of their rights under the contracts in a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles,* 147 F.3d 867, 871 (9th Cir. 1998) (quoting *Salerno,* 481 U.S. at 746) (internal quotation marks omitted).

[10] The district court did not evaluate the Lessees' claim under this framework because it determined that the reserved powers doctrine relieved the City of its obligations and left the Lessees without any enforceable contractual rights that could be protected by the Due Process Clause. *Matsuda,* 378 F. Supp. 2d at 1258. Because we have already concluded that the district court's application of the reserved powers doctrine was in error, we remand to the district court to reconsider the Lessees' due process claim once it has determined whether the Lessees had any contractual rights that could give rise to a protected property interest.

We express no opinion as to whether any property interests potentially arising from the Lessees' contracts could meet the "exceedingly high" burden our Due Process jurisprudence imposes. Furthermore, we express no opinion as to whether our decision in *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996)

(en banc), precludes the Lessees from asserting a substantive due process claim in this case, where the Contracts Clause provides a specific source of constitutional protection against the government conduct of which they complain. *Id.* at 1318.

IV

[11] Finally, we turn to the Lessees' contention that the City's alleged violations of the Contracts Clause and Due Process Clause violate § 1983. As an initial matter, we note that from the face of the Lessees' complaint and their subsequent filings in the district court, it is unclear whether they have preserved a claim for damages under § 1983 in the event the district court determines on remand that a constitutional violation has occurred. Nevertheless, both the Contracts Clause and the Due Process Clause may give rise to a claim under § 1983. *See S. Cal. Gas Co.*, 336 F.3d at 886-87 (holding that a Contracts Clause violation may support a § 1983 claim); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (recognizing a plaintiff's § 1983 claim predicated on an alleged violation of his substantive due process rights). Accordingly, because we conclude that the district court erred in applying the reserved powers doctrine to find that no constitutional violations occurred, we vacate the district court's grant of summary judgment to the City on the Lessees' § 1983 claims and remand. If the district court on remand determines that the Lessees' contractual rights survived Chapter 38's repeal, the Lessees may be able to assert a claim under § 1983 under either constitutional provision.

V

Based on the foregoing, we VACATE the district court's grant of summary judgment in favor of the City and REMAND for further proceedings. Each party shall bear its own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15337
D.C. No. CV-05-000125-DAE

[Filed January 14, 2008]

SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; et al.,	)
Plaintiffs-Appellants,	)
V.	)
CITY AND COUNTY OF HONOLULU,	)
Defendant-Appellee.	)

JUDGMENT

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Trascript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **VACATED and case is REMANDED for further**

proceedings. Each party shall bear its own costs on appeal.

Filed and entered 01/14/08.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case: CV 05-000125DAE-LEK

[Filed January 30, 2006]

SALLY A. MATSUDA, et al.,	)
	)
Plaintiff(s),	)
	)
V.	)
	)
CITY AND COUNTY OF HONOLULU,	)
	)
	)
Defendant(s).	)
	)

JUDGMENT IN A CIVIL CASE

* * *

[✓] **Decision by Court**. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendant City and County of Honolulu and against Plaintiffs pursuant to the

"Order Granting Defendant's Motion for Summary Judgment" filed on October 27, 2005.

cc: all counsel of record

January 30, 2006
Date

SUE BEITIA
Clerk

/s/
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CV. NO. 05-000125 DAE-LEK

[Filed October 27, 2005]

SALLY A. MATSUDA, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CITY AND COUNTY OF HONOLULU,	)
	)
	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Defendant's motion and the supporting and opposing memoranda, the Court GRANTS Defendant's Motion for Summary Judgment.

FACTUAL BACKGROUND

Plaintiffs, who hold leasehold interests in residential condominiums at the Discovery Bay condominium complex, have sued Defendant, the City and County of Honolulu ("City"), seeking to invalidate a city ordinance that Plaintiffs claim violates the Due Process Clause and the Contracts Clause of the United States Constitution.

Plaintiffs each hold legal title to their respective residential condominium units in the Discovery Bay condominium complex, which consists of several leasehold condominium units located at 1778 Ala Moana Boulevard, Honolulu, Hawaii. Plaintiffs individually entered into written Leased Fee Interest Purchase Contracts with the City. Plaintiffs each paid the City $1,000 in consideration, and in return, the City agreed as follows:

> The City shall convey to the Buyer by Quitclaim Deed (a) all of its right, title and interest in (I) the Unit and all limited common elements appurtenant to the Unit, and (ii) the undivided percentage interest in the real property and other common elements upon which the Unit is situated and (b) all of its right, title and interest in Buyer's Condominium Conveyance Document ("Condominium Conveyance Document") of the Unit and the real property ("Real Property").

(*See, e.g.*, Pl. Memo. in Supp., Ex. 1 at 1.) These actions were to be undertaken after the City acquired the property through its power of eminent domain, pursuant to Chapter 38 of the Revised Ordinances of

Honolulu 1990 and the Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion.

On August 3, 2004, the director of the Honolulu Department of Community Services determined that the public purpose of Chapter 38 would be effectuated by the acquisition of the leased fee interests in Discovery Bay, either by exercise of the power of eminent domain, or by purchase under the threat of eminent domain. (*See, e.g.*, Pl. Memo. in Supp., Ex. 28.) On November 24, the director of DCS designated Plaintiffs' leased fee interests in the real property and other common elements at Discovery Bay, for acquisition through the exercise of the power of eminent domain pursuant to R.O.H. § 38-2.2 and Rules § 2-11. *Id.*

Plaintiffs assert that, accordingly, Plaintiffs were determined by DCS to have met all the qualifications stated in Chapter 38 entitling them to purchase the leased fee interest in the real property appurtenant to their respective residential condominium units in Discovery Bay. In late October and early November of 2004, Plaintiffs received written notification of their final approval to proceed with the process provided in Chapter 38 for leasehold conversion. (*See, e.g.*, Pl. Memo. in Supp., Ex. 29.)

On August 2, 2004, Honolulu City Council Member Mike Gabbard introduced City Council Bill 04-53 ("Bill 53"), which was written to repeal Chapter 38. In section 1 of the bill, the City Council issued the following findings:

The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ("Charter") states: "The council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted." Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.

The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists "runaway land prices," "shortage of fee simple residential condominiums," "artificial inflation of land values," "lessees forced to accept long-term leases . . . which contains terms and conditions which are financially disadvantageous to them," "land values, artificially inflated by concentrated or single ownership," and "potential for economic instability and disruption on Oahu" as public purpose furthered by Chapter 38.

The council finds that mandatory conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38 do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.

Finally, "there is no vested right in a public law which is not in the nature of a private grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has

> the right to abrogate it.... No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit." *In re Application of Herrick*, 93 Haw. 329, 338 (1996).
>
> Based on the forgoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

(Def. Memo. in Opp'n, Ex. B at 1.)

Bill 53 provided a savings clause, however, for those lessee applicants who were already involved in the condemnation process under Chapter 38 when Bill 53 became law. The clause provides:

> Section 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH,as existing on the day before the effective date of this ordinance.

(Def. Memo. in Opp'n, Ex. B at 2.) The City Council's approval is the determinative event on which permission to continue the leasehold condominium conversion process under Chapter 38 hinges.

On November 10, 2004, City Council Member Donovan Dela Cruz introduced Resolution 04-341, which sought council authorization for the corporation council to initiate an eminent domain proceeding on behalf of Plaintiffs at Discovery Bay. (Pl. Memo. In Supp., Ex. 60.) Resolution 04-341 was referred to the council's Executive Matters Committee, which deferred consideration of the resolution pending the passage of Bill 53. On January 26, 2005, the Council voted 6-3 to pass Bill 53 into law.

Plaintiffs maintain that the City Council considered and rejected less drastic alternatives to Bill 53 in the months preceding the adoption of the Bill. Indeed, Plaintiffs note that City Council Member Charles Djou introduced a modified version of Bill 53 that would have preserved Plaintiffs' contracts while still effecting the repeal of Chapter 38. This version would have exempted a development that was validly designated before the effective date of Bill 53, and for which a sufficient number of lessees applied and executed leased fee purchase contracts with the City before the effective date of Bill 53. Djou's version, however, was rejected by a 6-3 vote on January 13, 2004.

Bill 53 became effective as Ordinance 05-001, and Chapter 38 was repealed, on February 7, 2005. Under the savings provision of Ordinance 05-001, only those lessee applicants who received council approval before February 7, 2005, are permitted to complete the process of leasehold condominium conversion under the provisions of Chapter 38. Plaintiffs, the lessee applicants at Discovery Bay, were unable to receive council approval prior to February 7, and therefore

they are unable under Ordinance 05-001 to complete their leasehold conversion.

PROCEDURAL HISTORY

Plaintiffs filed suit against the City on February 25, 2005, alleging that the repeal of Chapter 38 is unconstitutional, because: Bill 53 constitutes an impairment of the obligation of contracts in violation of Article 1, Section 10; Bill 53 constitutes a bill of attainder in violation of Article I, Section 10; Bill 53 deprives Plaintiffs of property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Plaintiffs seek declaratory relief in the form of an order declaring the ordinance to be null and void as a violation of the Contracts Clause, the Due Process Clause, and 42 U.S.C. § 1983, and injunctive relief enjoining the implementation of the ordinance.

Plaintiffs filed a Motion for a Preliminary Injunction on March 11, 2005.

On April 4, the Court heard Plaintiffs' motion for a preliminary injunction. At the hearing, the Court denied Plaintiffs' motion, explaining that the lack of irreparable harm precluded the grant of preliminary injunctive relief. Rather, the Court explained that motions for summary judgment were the proper form for Plaintiffs' and Defendant's arguments, and ordered Plaintiffs to file a motion for summary judgment.

Plaintiffs filed their motion on April 25, 2005. On May 9, Defendant filed its Opposition. On May 16, Plaintiffs filed their reply in support of the motion.

On June 17, 2005, the parties filed a stipulation to consolidate the instant case with *Hsiung, et al., v. City and County of Honolulu,* CV. NO. 05-00104.

On July 19, 2005, after carefully considering the voluminous filings of the parties, the Court denied Plaintiffs' motion for summary judgment and ordered Defendant to file a motion for summary judgment.

On August 31, 2005, Defendant filed the instant motion for summary judgment. On October 7, Plaintiffs filed an opposition to the motion. Defendant filed a reply in support of their motion on October 14.

DISCUSSION

The Court, finding no cause to reconsider any portion of its July 19, 2005 order denying Plaintiffs' motion for surnmary judgment, adopts the reasoning more fully explicated in that order and addresses the additional arguments raised by Plaintiffs as follows.

In the July 19 order, the Court explained that Plaintiffs' Contracts Clause challenge must fail, because clear, binding precedent indicates that the reserved powers doctrine precludes contractual obligations from limiting a municipality's power of eminent domain. The reserved powers doctrine provides that "a state government may not contract away 'an essential attribute of its sovereignty.'" *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996). The Court explained to the parties that, under the reserved powers doctrine, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust Co. of*

New York v. New Jersey, 431 U.S. 1, 23 (1977). Indeed, the United State Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. *See, e.g., West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535 (1848); *U.S. Trust Co. of New York*, 431 U.S. at 24, n. 21. The power of eminent domain, along with the police power, is often cited as the classic example of an "essential attribute of sovereignty." *U.S. Trust Co. of New York*, 431 U.S. at 23-24.

In the July 19 Order, the Court also rejected Plaintiffs' arguments that their contracts do not limit the right of eminent domain, but rather Chapter 38 does, and alternatively that while a contract cannot prevent the exercise of eminent domain, contracts purporting to require the exercise of the eminent domain power are acceptable under the reserved powers doctrine. As the Court explained, these arguments are illusory, because the sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so.

Additionally, the Court concluded in the July 19 order that, because the reserved powers doctrine operates to preclude any contractual limitation on the City's power of eminent domain, the Court would not consider the arguments raised by the parties regarding whether a valid contract was formed.

In their opposition to Defendant's motion for summary judgment, Plaintiffs reiterate their arguments from their motion for summary judgment, and further argue that this Court has misinterpreted *U.S.Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). The Court does not find that it has misinterpreted this case, and further finds no other reason to reconsider its order of July 19.

CONCLUSION

Therefore, for the reasons more fully explicated in this Court's order of July 19, 2005, the reasoning of which is incorporated herein, the Court GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 27 2005.

/s/
DAVID ALAN EZRA
CHIEF UNITED STATES
DISTRICT JUDGE

Sally A. Matsuda. et al., v. City and County of Honolulu, CV. NO. 05-00125 DAE-LEK; ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CV. NO. 05-000125 DAE-LEK

[Filed July 19, 2005]

SALLY A. MATSUDA, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CITY AND COUNTY OF HONOLULU,	)
	)
	)
Defendant.	)
	)

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Court heard Plaintiffs' Motion on June 22, 2005. David A. Nakashima, Esq., and Larisa L. Heroldt, Esq., appeared at the hearing on behalf of Plaintiffs; Deputies Corporation Counsel Don S. Kitaoka, Derek T. Mayeshiro, and Paul M. Iguchi, appeared at the hearing on behalf of Defendant. After reviewing the motion and the supporting and opposing

memoranda, the Court DENIES Plaintiffs' Motion for Summary Judgment.

BACKGROUND

Plaintiffs, who hold leasehold interests in residential condominiums at the Discovery Bay condominium complex, have sued Defendant, the City and County of Honolulu ("the City"), seeking to invalidate a city ordinance that Plaintiffs claim violates the Due Process Clause and the Contracts Clause of the United States Constitution.

Plaintiffs each hold legal title to their respective residential condominium units in the Discovery Bay condominium complex, which consists of several leasehold condominium units located at 1778 Ala Moana Boulevard, Honolulu, Hawaii. Plaintiffs individually entered into written Leased Fee Interest Purchase Contracts with the City. Plaintiffs each paid the City $1,000 in consideration, and in return, the City agreed as follows:

> The City shall convey to the Buyer by Quitclaim Deed (a) all of its right, title and interest in (i) the Unit and all limited common elements appurtenant to the Unit, and (ii) the undivided percentage interest in the real property and other common elements upon which the Unit is situated and (b) all of its right, title and interest in Buyer's Condominium Conveyance Document ("Condominium Conveyance Document") of the Unit and the real property ("Real Property").

(*See, e.g.*, Pl. Memo. in Supp., Ex. 1 at 1.) These actions were to be undertaken after the City acquired the property through its power of eminent domain, pursuant to Chapter 38 of the Revised Ordinances of Honolulu 1990 and the Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion.

On August 3, 2004, the director of the Honolulu Department of Community Services determined that the public purpose of Chapter 38 would be effectuated by the acquisition of the leased fee interests in Discovery Bay, either by exercise of the power of eminent domain, or by purchase under the threat of eminent domain. (*See, e.g.*, Pl. Memo. in Supp., Ex. 28.) On November 24, the director of DCS designated Plaintiffs' leased fee interests in the real property and other common elements at Discovery Bay, for acquisition through the exercise of the power of eminent domain pursuant to R.O.H. § 38-2.2 and Rules § 2-11. *Id.*

Plaintiffs assert that, accordingly, Plaintiffs were determined by DCS to have met all the qualifications stated in Chapter 38 entitling them to purchase the leased fee interest in the real property appurtenant to their respective residential condominium units in Discovery Bay. In late October and early November of 2004, Plaintiffs received written notification of their final approval to proceed with the process provided in Chapter 38 for leasehold conversion. (*See, e.g.*, Pl. Memo. in Supp., Ex. 29.)

On August 2, 2004, Honolulu City Council Member Mike Gabbard introduced City Council Bill 04-53 ("Bill

53"), which was written to repeal Chapter 38. In section 1 of the bill, the City Council issued the following findings:

> The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ("Charter") states: "The council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted." Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.
>
> The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists "runaway land prices," "shortage of fee simple residential condominiums," "artificial inflation of land values," "lessees forced to accept long-term leases . . . which contains terms and conditions which are financially disadvantageous to them," "land values, artificially inflated by concentrated or single

ownership," and "potential for economic instability and disruption on Oahu" as public purpose furthered by Chapter 38.

The council finds that mandatory conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38 do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.

Finally, "there is no vested right in a public law which is not in the nature of a private

> grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it.... No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit." *In re Application of Herrick,* 82 Haw. 329, 338 (1996).
>
> Based on the forgoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

(Def. Memo. in Opp'n, Ex. B at 1.)

Bill 53 provided a savings clause, however, for those lessee applicants who were already involved in the condemnation process under Chapter 38 when Bill 53 became law. The clause provides:

> Section 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance.

(Def. Memo. in Opp'n, Ex. B at 2.) The City Council's approval is the determinative event on which

permission to continue the leasehold condominium conversion process under Chapter 38 hinges.

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Plaintiffs maintain that the City Council considered and rejected less drastic alternatives to Bill 53 in the months preceding the adoption of the Bill. Indeed, Plaintiffs note that City Council Member Charles Djou introduced a modified version of Bill 53 that would have preserved Plaintiffs' contracts while still effecting the repeal of Chapter 38. This version would have exempted a development that was validly designated before the effective date of Bill 53, and for which a sufficient number of lessees applied and executed leased fee purchase contracts with the City before the effective date of Bill 53. Djou's version, however, was rejected by a 6-3 vote on January 13, 2004.

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the provisions of Chapter 38. Plaintiffs, the lessee applicants at Discovery Bay, were unable to receive council approval prior to February 7, and therefore they are unable under Ordinance 05-001 to complete their leasehold conversion.

Plaintiffs filed suit against the City on February 25, 2005, alleging that the repeal of Chapter 38 is unconstitutional, because: Bill 53 constitutes an impairment of the obligation of contracts in violation of Article 1, Section 10; Bill 53 constitutes a bill of attainder in violation of Article 1, Section 10; Bill 53 deprives Plaintiffs of property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Plaintiffs seek declaratory relief in the form of an order declaring the ordinance to be null and void as a violation of the Contracts Clause, the Due Process Clause, and 42 U.S.C. § 1983, and injunctive relief enjoining the implementation of the ordinance.

Plaintiffs filed a Motion for a Preliminary Injunction on March 11, 2005.

On April 4, the Court heard Plaintiffs' motion for a preliminary injunction. At the hearing, the Court denied Plaintiffs' motion, explaining that the lack of irreparable harm precluded the grant of preliminary injunctive relief. Rather, the Court explained that motions for summary judgment were the proper form for Plaintiffs' and Defendant's arguments, and ordered Plaintiffs to file a motion for summary judgment.

Plaintiffs filed their motion on April 25, 2005. On May 9, Defendant filed its Opposition. On May 16, Plaintiffs filed their reply in support of the motion.

On June 17, 2005, the parties filed a stipulation to consolidate the instant case with *Hsiung, et al., v. City and County of Honolulu,* CV. NO. 05-00104.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be entered when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970)). However, the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. *Id.* at 323.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec.*

Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986) (citation omitted).

A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. *Id.* The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255. In ruling on a motion for summary judgment, the court must bear in mind the actual quantum and quality of proof necessary to support liability under the applicable law. *Id.* at 254. The court must assess the adequacy of the nonmovant's response and must determine whether the showing the nonmovant asserts it will make at trial would be sufficient to carry its burden of proof. *See Celotex,* 477 U.S. at 322.

At the summary judgment stage, this Court may not make credibility determinations or weigh conflicting evidence. *Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: whether the evidence presents a sufficient

disagreement to require submission to a jury, or is so one-sided that one party must prevail as a matter of law. *Id.* (citation omitted).

DISCUSSION

As the Court expressed at the hearing on this motion, the Court sees before it a sad, unnecessary case. It is not the place of the Court to challenge the actions taken by the City Council in terms of wisdom or public policy, and this order will not purport to do so. However, the fair and wise decision, from the perspective of the City, would have been to draft the repeal of Chapter 38 so as to allow those leaseholders such as Plaintiffs, who have begun in good faith the process of conversion, to be grandfathered in. The integrity of the City Council members who reached this decision has never been doubted; however, the people of the City and County of Honolulu are ill-served by the avoidable waste of taxpayers' money that has resulted from this decision. Nonetheless, the duty of the Court is to uphold the Constitution and the republican form of government of the United States. The Court therefore addresses Plaintiffs' claims as follows.

Plaintiffs assert that the repeal of Chapter 38 constitutes a violation of the Contracts Clause, because it effects a substantial impairment of Plaintiffs' contracts with the City. However, Defendant argues that it is absolved from any liability based on an exception to the requirements of the Contracts Clause that has been carved out by the courts and referred to as the "reserved powers" doctrine. The reserved powers doctrine provides that "a state government may not

contract away 'an essential attribute of its sovereignty.'" *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996).

Under the reserved powers doctrine, when a state impairs the obligation of its own contract, the initial inquiry concerns the ability of the state to enter into an agreement that limits its power to act in the future. *U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 23 (1977). This inquiry requires a determination as to the state's power to create irrevocable contract rights, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. *Id.* "In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *Id.*

Applying this standard, the United State Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. *See, e.g., West River Bridge Co. v. Dix,* 47 U.S. 507, 6 How. 507, 12 L.Ed. 535 (1848) (holding that the Contracts Clause does not prevent a State from exercising the power of eminent domain) ("This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."); *U.S. Trust Co. of N.Y.*, 431 U.S. at 24, n. 21 ("[T]he doctrine that a State cannot contract away the power of eminent domain has been established since *West River Bridge Co. v. Dix.* . . . "); *Winstar Corp.*, 518 U.S. at 874 (citing *West River*

Bridge for the proposition that "a state's contracts do not surrender its eminent domain power"). Indeed, the power of eminent domain, along with the police power, is often cited as the classic example of an "essential attribute of sovereignty." *U.S. Trust Co. of New York*, 431 U.S. at 23-24.

Indeed, the federal courts' answer to the argument presented by Plaintiffs was already a foregone conclusion almost a century ago, as the Supreme Court explained:

> There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties . . . . [I]t is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine.

Contributors to Pennsylvania Hosp. v. City of Pa., 245 U.S. 20, 23-24 (1917) (internal citations omitted). The Supreme Court's long line of precedent on the subject also shows that the reserved powers doctrine applies equally to protect the right of eminent domain from

contractual infringement when that right has been delegated to a municipality. *See, e.g., Contributors to Pa. Hosp.,* 245 U.S. at 23-24 (applying the reserved powers doctrine to the exercise of eminent domain by a municipality). In the instant case, the state legislature delegated its power of eminent domain to the City and County of Honolulu in Hawaii Revised Statute § 46-1.5(6).

In recent years, the Supreme Court has taken no action that would undermine this longstanding authority. Rather, the Court's latest decisions regarding the power of eminent domain have only bolstered the "longstanding policy of deference to legislative judgments in this field." *See, e.g., Kelo v. City of New London,* 125 S. Ct. 2655, 2663 (2005). In *Kelo,* the United States Supreme Court was faced with a factually distinguishable scenario from the one at hand; the petitioners in that case were landowners who sought to challenge a city's exercise of eminent domain power over their property, arguing that the takings were not for public use. *Kelo,* 125 S. Ct. at 2658-2661. However, in affirming the city's finding of public purpose that underlaid its exercise of eminent domain, the Supreme Court once again evidenced the wide berth afforded to states and municipalities in the exercise of that particular sovereign power. Reiterating its pronouncement in *Haw. Hous. Auth. v. Midkiff,* 467 U.S. 229, 242 (1984), the Court in *Kelo* explained: "When the legislature's purpose is legitimate, and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings ... are not to be carried out in the federal courts." *Kelo,* 125 S. Ct. at 2667.

Plaintiffs simply have not brought forth any argument that would persuade the Court that this clear Supreme Court precedent is somehow inapplicable to the facts of this case. Plaintiffs assert that their contracts do not limit the right of eminent domain, but rather Chapter 38 does. Alternatively, Plaintiffs argue that the aforementioned cases only stand for the proposition that a contract cannot prevent the exercise of eminent domain; contracts purporting to require the exercise of the eminent domain power are therefore acceptable under the reserved powers doctrine, Plaintiffs contend. These arguments are illusory. The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so. Although factually distinguishable, the Supreme Court's recent decision in *Kelo* may be construed as support for the proposition that a legislature's power of eminent domain necessarily encompasses the ability to both exercise the right and to limit the right. *Kelo,* 125 S.Ct. at 2668 ("In affirming the City's authority to take petitioners' properties, ... [w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."). Thus, the Court finds that the Contracts Clause cannot be used under these circumstances to invalidate the repeal of Chapter 38, because the reserved powers doctrine reserves essential attributes of sovereignty such as the power of eminent domain to the discretion of the states.

Because the Court finds that the reserved powers doctrine applies to create an exception to the Contract Clause analysis, the Court does not consider the parties' arguments regarding the unmistakability doctrine. The so-called unmistakability doctrine provides that a sovereign will only be held to have surrendered its sovereign powers if the contractual limitation explicitly states as much. "Without regard to its source, sovereign power, even when unexercised is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in *unmistakable* terms." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment,* 477 U.S. 41, 52 (1986) (emphasis added). As noted above, however, the Supreme Court has also indicated that, under the reserved powers doctrine, a sovereign can never be contractually bound to surrender "an essential attribute of its sovereignty." *United States Trust Co. of N.Y.,* 431 U.S. at 23. The Supreme Court explained the two doctrines, which emerged in the mid-Nineteenth Century, as follows:

> [T]wo distinct limitations developed to protect state regulatory powers. One came to be known as the 'reserved powers' doctrine, which held that certain substantive powers of sovereignty could not be contracted away. *See West River Bridge Co. v. Dix,* 6 How. 507, 12 L.Ed. 535 (1848) (holding that a State's contracts do not surrender its eminent domain power). The other, which surfaced somewhat earlier in *Providence Bank v. Billings*, 4 Pet. 514, 7 L.Ed. 939 (1830), and *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 11 Pet. 420, 9 L.Ed. 773 (1837), was a canon of

> construction disfavoring implied governmental obligations in public contracts. Under this rule that "[a]ll public grants are strictly construed," we have insisted that "[n]othing can be taken against the State by presumption or inference," and that "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."

Winstar Corp., 518 U.S. at 874-75. The Court finds that the only reasonable way to read the two doctrines together is to hold that the unmistakability doctrine applies to require any contractual limitations on a sovereign's powers to be drafted in unmistakable terms, but that under the reserved powers doctrine, a subset of these sovereign powers are so essential that they may never be contractually limited, regardless of the language used. *See also Winstar Corp.*, 518 U.S. at 889 n. 34 (addressing action against the federal government rather than a state, but discussing at length the doctrine of unmistakability and indicating there are " 'core governmental powers' that cannot be surrendered under the reserved powers doctrine"). As such, given that the Court has found that the sovereign's discretion to use the eminent domain power is protected under the reserved powers doctrine, the doctrine of unmistakability is simply inapplicable.

Moreover, because the Court concludes that the reserved powers doctrine operates to preclude any contractual limitation on the City's power of eminent domain, the Court declines to consider the arguments

raised by the parties regarding whether a valid contract was formed.

CONCLUSION

The Court therefore finds that the City Council acted within its appropriate constitutional and legal limits in repealing Chapter 38. The Plaintiffs' Motion for Summary Judgment is hereby DENIED. The Defendant is directed to file a motion for summary judgment consistent with this opinion.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 19, 2005 .

/s/
DAVID ALAN EZRA
CHIEF UNITED STATES
DISTRICT JUDGE

Sally A. Matsuda, et al., v. City and County of Honolulu, CV. NO. 05-00125 DAE-LEK; ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

APPENDIX E

ORDINANCE NO. 91-95 BILL NO. 156 (1990)
CD-1, FD-1

A BILL FOR AN ORDINANCE RELATING TO RESIDENTIAL CONDOMINIUM AND COOPERATIVE LEASEHOLD CONVERSION FOR REAL PROPERTY SITUATED IN THE CITY AND COUNTY OF HONOLULU.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Findings and Purpose.

Tbe Council finds that:

(a) The historical pattern of landownership on Oahu has led to the practice of landowners leasing rather than selling their land. Ownership of land beneath residential condominium apartments, cooperative housing units and residential planned developments on Oahu is consistent with this pattern and is concentrated in the hands of the owners of such land who have refused to sell proportionate shares in their fee simple titles to such land to the lessees residing in residential condominium apartments, cooperative housing units and planned developments situated on such land and who have instead engaged in the practice of leasing such proportionate shares of their lands to such lessees under long-term leases.

Runaway land prices, especially in the last three years, have put housing costs well beyond the means of a large segment of the population. These prices are driving up new leasehold ground rents (lease rents) that in large measure are based upon present fee values.

Under the terms of most residential leases, the renegotiated lease rent amount is typically based on land values existing at the time of renegotiation. As a result, the acute recent inflation of land costs has adversely affected lease rent negotiations of persons who have purchased leasehold multi-family units as their homes: in some instances renegotiations have resulted in lease rents that have increased over 1,000 percent. Under the burden of increased lease rents, many owner-occupants of residential condominium apartments, cooperative housing units and planned development units, especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes. If they are displaced from these homes, these owner-occupant lessees could be displaced entirely from the ranks of home-owners because of Oahu's continuing housing crisis. Therefore, there is a desire by many lessees to convert to fee ownership. At the present time, there are approximately16,000 – 17,000 residential condominium, cooperative and planned development units on leased land on Oahu.

The refusal of such landowners to sell proportionate shares in their fee simple titles to their lands to such lessees and cooperative owners and the pervasiveness of such practice of leasing rather than selling such shares in the land has resulted in a

serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and in an artificial inflation of the value of such land on Oahu.

Due to such shortage of fee simple residential condominium, cooperative and planned development land and such artificial inflation of such land values, many people on Oahu have been deprived of a choice to own an interest in or take a lease of the land on which their residential condominium, cooperative and planned development homes are situated and have been required instead to pay exorbitant leased fee purchase prices for a proportionate fee simple ownership share in such land. These lessees have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the landowners; or to surrender title to and possession of their residential condominium, cooperative and planned development homes at the expiration of their current leases.

The acquisition by people, who are lessees and owners of condominium apartments, cooperative housing units and planned development units, of proportionate shares of the land on which their homes are situated in fee simple, at fair and reasonable prices and the ability of such lessees and owners to fully enjoy such land through proportionate ownership of such land in fee simple will alleviate these conditions and will promote the economy of Oahu and public interest, health, welfare, security and happiness of such lessees and owners.

There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium, cooperative housing and planned development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium, cooperative housing and planned development land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions all are productive of general benefit to all members of Oahu's community.

The sound and wise conservation, preservation, use and management of residential condominium, cooperative housing and planned development land cannot be separated from the subject of patterns of residential condominium, cooperative and planned development land ownership. To accomplish the public purpose of wisely conserving, preserving, using, and managing residential condominium, cooperative housing and planned development land on Oahu requires changing present patterns of residential condominium, cooperative housing and residential planned development land ownership. Changing present patterns of such land ownership on Oahu by allowing residential condominium lessees, cooperative housing unit owners and planned development

housing owners under leases of such land to purchase in fee simple, a proportionate share of such land on which their homes are situated through the exercise of the City's power of eminent domain to acquire such fee simple interest to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City, will help to satisfy the pressing public necessity for a secure, strong and stable Oahu economy.

The use of the City's eminent domain power to condemn the fee simple title to residential condominium, cooperative housing units and residential planned development land and the payment of just compensation therefor for the purpose of making proportionate shares of the fee simple title thereto and the use thereof available for acquisition by people who are condominium lessees, cooperative housing unit owners and owners of planned development units under leases of such land on which their homes are situated, or who face imminent expiration of such leases and the potential surrender, altogether, of title to and possession of their residential condominium apartments, cooperative housing units and planned development units in accordance with such leases is for a public use and purpose.

The power of the City to use eminent domain to effectuate the purposes and objectives of this Bill is granted to the City under Sections 46-1.5(6), (13) and (16) and Chapter 101, Hawaii Revised Statutes.

(b) It is therefore declared to be necessary and it is the purpose of this Ordinance to alleviate the conditions found in subsection (a) of this Ordinance by providing for the right of any person who is a lessee or owner under a long-term lease of residential condominium, cooperative housing unit or residential planned development land on Oahu to purchase at a fair and reasonable price a proportionate share of the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the City through the use of its eminent domain power and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City.

SECTION 2. The Revised Ordinances of Honolulu is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER ___.
RESIDENTIAL CONDOMINIUM, COOPERATIVE HOUSING AND RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLD CONVERSION.

ARTICLE 1. GENERAL PROVISIONS.

Sec. __-1.1. Purpose. The purpose of this Chapter is to establish the right of any person, who is a lessee under any long-term lease of land upon which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii

Revised Statutes, cooperative housing unit projects or residential planned development projects, to purchase at a fair and reasonable price the fee simple title to such land.

Sec. __-1-2. Definitions. Unless otherwise clear from the context, as used in this Chapter:

"Association of apartment owners" has the same meaning as in section 514A-3, Hawaii Revised Statutes.

"City" means the City and County of Honolulu.

"Condominium" means an residential apartment, together with an appurtenant undivided interest in common elements, located on land subject to a declaration of condominium property regime as defined in Chapter 514A, Hawaii Revised Statutes, together with an appurtenant undivided interest in common elements, both used or occupied, or developed, devoted, intended, or permitted to be used family or occupied as a principal place of residence for a single family.

"Condominium property regime" means a condominium property regime project established under Chapter 514A, Hawaii Revised Statutes.

"Cooperative" means a residential apartment in a housing project held, owned, or leased by a cooperative housing corporation.

"Cooperative owner" means the owner of a cooperative.

"Cooperative housing corporation" means a corporation which satisfies the requirements of section 519-3(d)(1), Hawaii Revised Statutes, or of Chapter 421H, Hawaii Revised Statutes, and the requirements of section 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the City department of housing and community development created by Article 6, Chapter 10, Revised Charter of the City and County of Honolulu 1973, as amended.

"Development" means an area of land, irrespective of size, which:

(1) Is subject to a declaration of condominium property regime pursuant to Chapter 514A, Hawaii Revised Statutes, which condominium property regime contains or is intended to contain condominium apartment units occupied or to be occupied under apartment leases or condominium conveyance documents; or

(2) Contains or is intended to contain a cooperative housing unit project held, owned or leased by a cooperative housing corporation.

(3) Contains or is intended to contain a residential planned unit development project.

To qualify as a development, there shall be ten or more residential condominium apartment units, cooperative

housing apartment units or residential planned development housing units on the land.

"Director" means the director of the department of housing and community development.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy land or an interest in land would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased under an apartment lease, condominium conveyance document, or proprietary lease, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the person's heirs, successors, legal representatives, and assigns.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor, to a lessee or sublessee, or by any other person as sublessor to any person, in consideration of payment of rent or other recompense. With respect to a cooperative, lease means a ground lease to the cooperative housing corporation and not leases to the individual apartment unit owners.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, other than the lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee" means any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit, residential cooperative housing unit or residential planned development unit.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives, and assigns.

"Person" means any person who leases or subleases land from a lessor and, for purposes of this Chapter, means the same as the term "lessee" as used in this Chapter.

"Planned development" means a housing development project, also known as a cluster housing development or planned unit development, where the apartment owner holds a leasehold interest in the lot under his or her unit, and provided that this interpretation excludes any planned unit development covered by Chapter 516, Hawaii Revised Statutes.

The terms "lessors", "lessees", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and the terms also include corporations, firms, associations, trusts, estates, and

the State and the City and County of Honolulu. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

The term "owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit, residential cooperative apartment unit or residential planned development unit which, simultaneous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held. Proof of residency and possessory control shall be as established by rules adopted by the Department.

The term "owner-occupant-shareholder" means any individual who is a sole or joint legal owner of shares in a cooperative housing corporation or trust and leases a cooperative apartment unit which, simultaneous to the individual being a shareholder, serves at the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee;

provided that the individual shall retain complete possessory control of the premises of the unit during these periods. An individual shall not be deemed to have complete possessory control of the premises of the unit if the individual rents, leases, or assigns the premises for any period of time to any other person who is not a shareholder and does not have a proprietary lease to the cooperative apartment unit. Proof of residency and possessory control shall be as established by rules adopted by the Department.

For purposes of this Chapter, the terms "residential condominium apartment", "residential condominium housing unit", "residential cooperative housing unit", "residential cooperative apartment unit", or "residential planned development unit" shall not include the following:

(1) a unit used for commercial purposes;
(2) a unit used as a time share unit or transient vacation unit, as defined under chapter 21A, article 9; or
(3) any other nonresidential condominium, cooperative, or planned development unit.

Sec . __-1.3. Applicability. This Chapter applies to all lands, in the City and County of Honolulu on which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii Revised Statutes, cooperative housing units projects or residential planned development projects owned or held privately or by the City and County of Honolulu or by the State, except Hawaiian home lands subject to Article XII of the Constitution of the State and lands owned or held by the federal government.

This Chapter is not meant to supersede or preclude any other remedy at law available to condominium apartment owners, cooperative housing corporations or owners of residential planned development units, including those available under Chapter 480, Hawaii Revised Statutes.

Sec. __-1.4. No estoppel or waiver. The rights granted to lessees by this Chapter shall be effective, notwithstanding any provision in any lease, contract, covenant, bylaw, or articles of incorporation to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted by this Chapter, or otherwise be deemed to have waived those rights. Any provision in any lease, covenant, contract, bylaw or article of incorporation contrary to the intent or purpose of this Chapter shall be void.

Sec. __-1.5. Trusts and estates. The rights granted to lessees by this Chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether the tenancy, fee, estate, or trust was in effect prior to the effective date of this Chapter or is created hereafter; and the life tenant, holder, officer, or trustee of any tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required by this Chapter. Every instrument of this type now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this Chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner, while acting pursuant

to this Chapter, shall be deemed to be acting in bad faith or to have committed a breach of trust.

Sec. __-1.6. Penalty. Any person who violates any provision of this Chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple revolving fund created by section __-6.1.

Sec. __-1.7. Administration of Chapter. The department of housing and community development shall administer this Chapter.

Sec. __-1.8. Department's duties, generally. In addition to any other duty prescribed by law and in this Chapter, the director of the department of housing and community development shall:

(1) Within six months after the effective date of this Chapter, adopt in accordance with Chapter 91, Hawaii Revised Statutes, rules necessary to effectuate the purposes of this Chapter;

(2) Be responsible for enforcement of this Chapter and the rules adopted pursuant to it;

(3) Establish reasonable fees to be assessed and collected from lessees for the services of any appraiser;

(4) Disseminate information and render assistance to lessees of residential condominiums, cooperative housing

developments and residential planned developments in order that this Chapter may be understood and effectively implemented;

(5) Conduct an investigation upon any written complaint or whenever it appears that a provision of this Chapter has been or is being violated. In the investigation, the director may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the director finds from satisfactory evidence that any person has violated or is violating this Chapter, the director may order the person to cease and desist from continuing the violation or engaging in or doing any act or acts in furtherance thereof and, where necessary, the director may bring an action in the name of the city and county of Honolulu in any court of competent jurisdiction for enforcement of its orders;

(6) Facilitate the acquisition of all necessary -- property -- interests by the city through eminent domain proceedings as provided in this Chapter;

(7) Facilitate the making and execution of contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the city under this Chapter;

(8) From time to time, require from the lessors of leases of residential condominiums, cooperative housing developments and residential planned developments and from all fee owners and legal and equitable owners of such condominiums, cooperatives and planned developments subject to leases of land, such information as it may reasonably require in connection with the administration of this Chapter; and

(9) Do all things necessary and convenient to carry out the powers expressly conferred upon the director by this Chapter.

Sec. __-1.9. Quitclaim deeds. Unless otherwise provided by law, the City shall issue quitclaim deeds whenever it conveys, transfers, sells, or assigns any property developed, constructed, or sponsored under this Chapter.

ARTICLE 2. CONDEMNATION OF CONDOMINIUM DEVELOPMENT LEASEHOLDS.

Sec. __-2.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are:

(1) Developed into condominium property regimes or occupied by residential lessees under leases or condominium conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into condominium property regimes occupied or to be occupied by residential lessees under apartment leases or condominium conveyance documents executed on or after the effective date of this Chapter; provided that ninety per cent of the leases to units in the condominium have been executed.

Sec. __-2.2. Designation of developnent for acquisition.

(a) Subject to subsection (b), the department may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twentyfive (25) of all the condominium owners within the development or at least owners of fifty percent (50%) of the condominium units, whichever number is less, apply to the department to purchase the leased fee interest pursuant to section __-2.4, and file an application with the department; and

(2) Due notice is given and a public hearing held, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days,

the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part, will effectuate the public purposes of this Chapter.

For purposes of this subsection, "condominium owners" means the owner-occupants of the condominium development.

(b) The land designated and acquired by the City may consist of a portion of or the entirety of the land area submitted to the declaration of condominium property.

Sec. __-2.3. Purchase of leased fee interest. The condominium lessees who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the City within sixty days of acquisition of the interest by the City, the leased fee interest appertaining to their condominiums, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to the lessees' condominium units, subject to the terms, covenants, and conditions of the contract executed with the City. If any lessee refuses to enter into such a contract, then in that event, such lessee shall pay to the City all costs incurred by the City in the acquisition of the appurtenant condominium

leased fee interest within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the condominium.

Sec. __-2.4. Qualification for purchase. (a) No sale of any condominium land within a development shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their condominium units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale, have an equitable interest in a condominium situated on the leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the

city and county of Honolulu or have pending before the State housing finance and development corporation, or the City department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu;

(5) submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. __-2.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their condominiums pursuant to this Chapter. The means of determining the amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. __-2.6. Preliminary negotiation required. (a) Upon the filing with the department of an application by the lessees in accordance with Sec. __--2.2(a)(1) of this Article, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section __-2.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the condominium development which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section __-2.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. __-2.7. Eminent domain trial. The parries to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, and the lessors and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 3.CONDEMNATION OF COOPERATIVE HOUSING DEVELOPMENT LEASEHOLDS.

Sec. __-3.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are leased to cooperative housing corporations that sublease individual apartments to residential lessees under proprietary leases executed either prior to or after the effective date of this Chapter; provided that ninety per cent of the proprietary leases to the cooperative have been executed.

Sec. __-3.2. Designation of development for acquisition.

(a) Subject to subsection (b), the department may designate all of a development for acquisition, and facilitate the acquisition of the leased fee interests in the development by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after:

(1) The cooperative housing corporation applies to the department to purchase the leased fee interest pursuant to section __-3.4 after the

cooperative housing corporation receives approval from its shareholders; and

(2) If, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this Article will effectuate the public purposes of this Chapter.

(b) The development designated and acquired by the City shall consist of the entire land parcel leased to a cooperative housing corporation.

(c) Where the cooperative housing development consists of both residential and nonresidential units, the terms "development", "cooperatives", or similar terms when used in this Article, including the provisions on acquisition, disposal, and financing of cooperatives and developments, shall be construed to apply only to the residential units.

Sec. __-3.3. Purchase of leased fee interest. The cooperative housing corporation which has applied to the department and which has qualified for purchase of the leased fee interest, shall purchase from the City within sixty days of acquisition of the interest by the

City, the entire leased fee interest appertaining to the cooperative subject to the terms, covenants, and conditions of the contract executed with the City provided that:

(1) If the cooperative housing corporation refuses to enter into such a contract, then it shall pay to the City all costs incurred by the City in the acquisition of the leased fee interest including, but not limited to, appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect these costs;

(2) In case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the cooperative.

Sec. __-3.4 Qualification for lease or purchase. (a) No sale of any leased fee interest in a cooperative housing development to a cooperative housing corporation shall be made unless the cooperative housing corporation satisfies the following requirements:

(1) Submission of proof, in such form as is acceptable to the department, that a majority of the shareholders of the cooperative housing corporation have approved or ratified the purchase of the leased fee interest of the development;

(2) Submission of a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the cooperative housing corporation will be able to promptly pay the City for the leased fee interest;

(3) Submission of an application for purchase of the leased fee interest in good faith, and in such form as is acceptable to the department;

(4) Execution of a contract for the purchase of the leased fee interest in such form as is acceptable to the department; and

(5) Submission of proof, in such form as is acceptable to the department, that at least sixty per cent of the cooperative housing corporation consists of owner-occupant-shareholders of residential units within the affected cooperative housing development.

(b) In the event of a wilful breach of contract by the cooperative housing corporation, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false

statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. __-3.5. Deposits by lessees. (a) The department may require the submission of a deposit by the cooperative housing corporation applying to the department for the purchase of the leased fee interest pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for those deposits under this section.

Sec. __-3.6. Preliminary negotiation required. (a) Upon the filing of a petition by the cooperative housing corporation with the department, the department shall request the lessor and the cooperative housing corporation to negotiate the just compensation which the cooperative housing corporation will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other

documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the cooperative housing corporation will be able to meet the financial requirements of section __-3.4(2).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section __-3.4(2) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. __-3.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the cooperative housing corporation, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 4. CONDEMNATION OF RESIDBHTXAL PLANNED DEVELOPMENT LEASEBOLDS.

Sec. __-4.1. Applicability. This Article applies to residential planned developments which, at the time of acquisition of the development by the City, are:

(1) Developed into residential planned developments and occupied by residential lessees under apartment leases or planned development conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into such planned developments occupied or to be occupied by residential lessees under apartment leases or planned development conveyance documents executed on or after the effective date of this Chapter; provided that ninety per cent of such leases to the planned unit development have been executed.

Sec. __-4.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all or a portion of the land beneath a planned development containing residential units for acquisition, and facilitate the acquisition of the applicable leased fee interests in such land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twenty-five (25) of all the owners within the development or at least owners of fifty percent (50%) of the residential units, whichever number is less, of all the owners within the planned development apply to the department to purchase the leased fee interest pursuant to section __-4.4, and file the application with the department; and

(2) Due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the city and county of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part will effectuate the public purposes of this Chapter. For purposes of this subsection, "owners", as used in Sec. __ -4.2(a)(1) means the owner-occupants of the planned developments.

(b) The land designated and acquired by the city may consist of a portion of or the entire land area submitted to the declaration of planned development.

Sec. __-4.4 Purchase of leased fee interest. The planned development lessees, who have authorized approval and who have qualified for purchase of the

leased fee interest, shall purchase from the city within sixty days of acquisition of the interest by the city, the leased fee interest appertaining to the planned development unit, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to their units, subject to the terms, covenants, and conditions of the contract executed with the city; if any lessees refuse to enter into such a contract, then in that event, those lessees shall pay to the city all costs incurred by the city in the acquisition of the relevant planned development within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the planned development.

Sec. __-4.4. Qualification for purchase. (a) No sale of any leased fee interest in land under a residential planned development land shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their residential planned units;

(2) Are bona fide residents of the city and county of Honolulu ;

(3) Have legal title to, or pursuant to an agreement of sale an equitable interest in a planned unit development situated on the

leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the city and county of Honolulu or have pending before the State housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands herein if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu ;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees of the residential planned development, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. __-4.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their planned development housing unit pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. __-4.6. Preliminary negotiation required. (a) Upon the filing of a petition by the lessees with the department, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section __-4.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the planned development, which were prepared by a party for use in preliminary

negotiations as provided for in this section, for setting qualifications amounts pursuant to section __-4.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. __-4.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 5. DOMAIN.

Sec. __-5.1. Applicability. This article applies to developments which are created by condominium property regimes under Chapter 514A, Hawaii Revised Statutes, and to developments existing under cooperative housing corporation status, and to residential planned developments not covered by Chapter 516, Hawaii Revised Statutes.

Sec. __-5.2. Exercise of power of eminent domain. Within twelve months after the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development by the city and county of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire

the leased fee interest or portion thereof so designated. If the leased fee interest is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of the land so designated for actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation.

Sec. __-5.3. Compensation. The compensation to be paid for the leased fee interest shall be the current fair market value of the leased fee interest. The compensation shall be determined as of the date of the summons of the complaint in eminent domain.

Sec. __-5.4. Interest acquired. (a) Upon acquisition of a development or portion thereof as provided in this article, the property interest acquired by the City is all of the right, title, and interest of the fee owner, and of the lessor and fee owner and all legal and equitable owners, if any besides the lessor, in and to the development or portion thereof acquired, subject to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential condominium or cooperative housing corporation leases, which are not inconsistent with the intent of this article. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the apartment lease, condominium conveyance document, or proprietary lease is subject to any leasehold mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee in no manner shall affect or impair such mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to the extent necessary to avoid any impairment of the leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance in writing consents to the transfer thereof to the fee and merger as provided in this Chapter. Upon written consent by the holder thereof, each leasehold mortgage, lien, or encumbrance to which the apartment lease, condominium conveyance document or proprietary lease is subject and to which the consent refers shall be transferred to and shall bind the fee acquired by the lessee, and thereafter shall continue in full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

Sec. __-5.5. Interest in compensation paid by the City. The lessor, the fee owner, and all legal and equitable owners shall share in the compensation paid by the City as their respective interest shall appear. Notwithstanding any provision to the contrary in any contract or lease, a developer or other person entitled

to share in the lease rentals shall share in the compensation paid by the City to the extent of the persons's interest as may be determined by agreement of those entitled to share in the compensation paid by the City and in the absence of such agreement pursuant to Chapter 658, Hawaii Revised Statutes.

Sec. __-5.6. Compulsory or involuntary conversion. It is the intent of the council, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of Chapter 235, Hawaii Revised Statutes, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the City under this part shall constitute a compulsory or involuntary conversion, as a result of the exercise of the power of condemnation or the threat of imminence thereof, and that the fee owner shall not, by reason in whole or in part of any provision of this Chapter or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this Chapter, be deemed to hold the property primarily for sale to customers in the ordinary course of trade or business.

ARTICLE 6. REVOLVINGFUND.

Sec. __-6.1. Fee simple condominium and cooperative and planned & development revolving fund. A fee simple condominium and cooperative and planned unit development revolving fund is hereby created. The funds appropriated for the purposes of this Chapter and all moneys received or

collected by the department of housing and community development under this Chapter shall be deposited in the revolving fund. The proceeds in the fund shall be used for the necessary expenses of the department, including administration, under this Chapter. All interest earned on moneys deposited by lessees into this revolving fund shall accrue to the lessees."

SECTION 3. If any article, section, sentence, clause, or phrase of this Chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining articles, sections, sentences, clauses, and phrases of this Chapter, or the application of this Chapter to other persons or transactions or circumstances, shall not be affected. The council hereby declares that it would have passed this Chapter and each article, section, clause, or phrase thereof, irrespective of the fact that any one or more articles, sections, sentences, clauses, or phrases of this Chapter, or its application to any person or transaction or other circumstance, be declared unconstitutional or invalid.

SECTION 4. This ordinance shall take effect on January 1, 1992.

INTRODUCED BY:

John Henry Felix

_____

_____

Councilmembers

DATE OF INTRODUCTION:

December 28, 1990
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

_____
Deputy corporation Counsel

APPROVED this ____, day of _____, 1991.

_____
FRANK F. FASI, Mayor
City and County of Honolulu

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

CERTIFICATE

I HEREBY CERTIFY that Bill No. 156 (1990) was passed on first reading on January 30, 1991; second reading on June 19, 1991; third reading, as amended to CD-1, FD-1, on December 4, 1991; and that it was published in the Honolulu Advertiser on June 22, 1991.

I FURTHER CERTIFY that on December 5, 1991 said Bill No. 156 (1990), CD-1, FD-1, was presented to the Honorable Frank F. Fasi, Mayor of the City and County of Honolulu, for his approval or otherwise; and

that on December 16, 1991, the Mayor returned said Bill without his signature; therefore, pursuant to Section 3-203 of the Revised Charter of Honolulu, said Bill No. 156 (1990), CD-1, FD-1, became a duly enacted ordinance on December 16, 1991 to become effective January 1, 1992.

DATED, Honolulu, State of Hawaii, this 18th day of December, 1991.

COUNCIL OF THE CITY AND
COUNTY OF HONOLULU

By /s/_____
ARNOLD MORGADO, JR.
Chair and Presiding Officer

ATTEST :

/s/_____
RAYMOND K. PUA
City Clerk

APPENDIX F

Chapter 38

RESIDENTIAL CONDOMINIUM, COOPERATIVE HOUSING AND RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLD CONVERSION

Articles:

1. General Provisions
2. Condemnation of Condominium Development Leaseholds
3. Condemnation of Cooperative Housing Development Leaseholds
4. Condemnation of Residential Planned Development Leaseholds
5. Eminent Domain
6. Revolving Fund

Article 1.
General Provisions

Sections:

38-1.1 Purpose.
38-1.2 Definitions.
38-1.3 Applicability.
38-1.4 No estoppel or waiver.
38-1.5 Trusts and estates.
38-1.6 Violation–Penalty.
38-1.7 Administration of chapter.
38-1.8 Department powers and duties.

38-1.9 Quitclaim deeds.

Sec. 38-1.1 Purpose.

The purpose of this chapter is to establish the right of any person, who is a lessee under any long-term lease of land upon which is situated either residential condominium property regime projects created under HRS Chapter 514A, cooperative housing unit projects or residential planned development projects, to purchase at a fair and reasonable price the fee simple title to such land. (Added by Ord. 91-95)

Sec. 38-1.2 Definitions.

Unless otherwise clear from the context, as used in this chapter:

"Association of apartment owners" has the same meaning as in HRS Section 514A-3.

"City" means the City and County of Honolulu.

"Condominium" means a residential apartment, together with an appurtenant undivided interest in common elements, located on land subject to a declaration of condominium property regime as defined in HRS Chapter 514A, together with an appurtenant undivided interest in common elements, both used or occupied, or developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for a single family.

"Condominium property regime" means a condominium property regime project established under HRS Chapter 514A.

"Cooperative" means a residential apartment in a housing project held, owned, or leased by a cooperative housing corporation.

"Cooperative owner" means the owner of a cooperative.

"Cooperative housing corporation" means a corporation which satisfies the requirements of HRS Section 519-3(d)(1), or of HRS Chapter 421H, and the requirements of Section 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the city department of housing and community development created by Article 6, Chapter 10, Revised Charter of the City and County of Honolulu 1973, as amended.

"Development" means the area of land, irrespective of size, which:

(1) Is subject to a declaration of condominium property regime pursuant to HRS Chapter 514A, which condominium property regime contains or is intended to contain condominium apartment units occupied or to be occupied under apartment leases or condominium conveyance documents; or

(2) Contains or is intended to contain a cooperative housing unit project held, owned or leased by a cooperative housing corporation;

(3) Contains or is intended to contain a residential planned unit development project;

To qualify as a development, there shall be 10 or more residential condominium apartment units, cooperative housing apartment units or residential planned development housing units on the land.

"Director" means the director of the department of housing and community development.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy land

or an interest in land would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased under an apartment lease, condominium conveyance document, or proprietary lease, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the person's heirs, successors, legal representatives, and assigns.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor, to a lessee or sublessee, or by any other person as sublessor to any person, in consideration of payment of rent or other recompense. With respect to a cooperative, lease means a ground lease to the cooperative housing corporation and not leases to the individual apartment unit owners.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, other than the lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee" means any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit,

residential cooperative housing unit or residential planned development unit.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives and assigns.

The terms "lessors," "lessees," "fee owner," and "legal and equitable owners" mean and include individuals, both masculine and feminine, and the terms also mean and include corporations, firms, associations, trusts, estates, and the state and the City and County of Honolulu. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

"Owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit, residential cooperative apartment unit or residential planned development unit which, simultaneous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided, that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held. Proof of residency and possessory control shall be as established by rules adopted by the department.

"Owner-occupant-shareholder" means any individual who is a sole or joint legal owner of shares in a cooperative housing corporation or trust and

leases a cooperative apartment unit which, simultaneous to the individual being a shareholder, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided, that the individual shall retain complete possessory control of the premises of the unit during these periods. An individual shall not be deemed to have complete possessory control of the premises of the unit if the individual rents, leases, or assigns the premises for any period of time to any other person who is not a shareholder and does not have a proprietary lease to the cooperative apartment unit. Proof of residency and possessory control shall be as established by rules adopted by the department.

"Person" means any person who leases or subleases land from a lessor and, for purposes of this chapter, means the same as the term "lessee" as used in this chapter.

"Planned development" means a housing development project, also known as a cluster housing development or planned unit development, where the apartment owner holds a leasehold interest in the lot under his or her unit, and provided that this interpretation excludes any planned unit development covered by HRS Chapter 516.

"Residential condominium apartment," "residential condominium housing unit," "residential cooperative housing unit," "residential cooperative apartment unit," or "residential planned development unit," for purposes of this chapter, do not mean and include the following:

(1) A unit used for commercial purposes;

(2) A unit used as a time-share unit or transient vacation unit as defined under Chapter 21, Article 10; or

(3) Any other nonresidential condominium, cooperative, or planned development unit.

(Added by Ord. 91-95)

Sec. 38-1.3 Applicability.

This chapter applies to all lands, in the City and County of Honolulu on which are situated either residential condominium property regime projects created under HRS Chapter 514A, cooperative housing units projects or residential planned development projects owned or held privately by the City and County of Honolulu or by the state, except Hawaiian home lands subject to Article XII of the Constitution of the State and lands owned or held by the federal government. This chapter is not meant to supersede or preclude any other remedy at law available to condominium apartment owners, cooperative housing corporations or owners of residential planned development units, including those available under HRS Chapter 480. (Added by Ord. 91-95)

Sec. 38-1.4 No estoppel or waiver.

The rights granted to lessees by this chapter shall be effective, notwithstanding any provision in any lease, contract, covenant, bylaw, or articles of incorporation to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted by this chapter, or otherwise be deemed to have waived those rights. Any provision in any lease, covenant,

contract, bylaw or article of incorporation contrary to the intent or purpose of this chapter shall be void. (Added by Ord. 91-95)

Sec. 38-1.5 Trusts and estates.

The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether the tenancy, fee, estate, or trust was in effect prior to the effective date of this chapter or is created hereafter; and the life tenant, holder, officer, or trustee of any tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding 20 years and shall perform all acts required by this chapter. Every instrument of this type now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner, while acting pursuant to this chapter, shall be deemed to be acting in bad faith or to have committed a breach of trust. (Added by Ord. 91-95)

Sec. 38-1.6 Violation–Penalty.

Any person who violates any provision of this chapter shall be fined not more than $1,000.00 or imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple fund created by Section 38-6.1. (Added by Ord. 91-95)

Sec. 38-1.7 Administration of chapter.

The department of housing and community development shall administer this chapter. (Added by Ord. 91-95)

Sec. 38-1.8 Department powers and duties.

In addition to any other duty prescribed by law and in this chapter, the director of the department of housing and community development shall:

(a) Within six months after the effective date of this chapter, adopt in accordance with HRS Chapter 91, rules necessary to effectuate the purposes of this chapter;
(b) Be responsible for enforcement of this chapter and the rules adopted pursuant to it;
(c) Establish reasonable fees to be assessed and collected from lessees for the services of any appraiser;
(d) Disseminate information and render assistance to lessees of residential condominiums, cooperative housing developments and residential planned developments in order that this chapter may be understood and effectively implemented;
(e) Conduct an investigation upon any written complaint or whenever it appears that a provision of this chapter has been or is being violated. In the investigation, the director may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the director finds from satisfactory evidence that

any person has violated or is violating this chapter, the director may order the person to cease and desist from continuing the violation or engaging in doing any act or acts in furtherance thereof and, where necessary, the director may bring an action in the name of the City and County of Honolulu in any court of competent jurisdiction for enforcement of its orders;

(f) Facilitate the acquisition of all necessary property interests by the city through eminent domain proceedings as provided in this chapter;

(g) Facilitate the making and execution of contracts, mortgages, and other instruments necessary or convenient to the exercise of powers of the city under this chapter;

(h) From time to time, require from the lessors of leases of residential condominiums, cooperative housing developments and residential planned developments and from all fee owners and legal and equitable owners of such condominiums, cooperatives and planned developments subject to leases of land, such information as it may reasonably require in connection with the administration of this chapter; and

(i) Do all things necessary and convenient to carry out the powers expressly conferred upon the director by this chapter.

(Added by Ord. 91-95)

Sec. 38-1.9 Quitclaim deeds.

Unless otherwise provided by law, the city shall issue quitclaim deeds whenever it conveys, transfers,

sells or assigns any property developed, constructed, or sponsored under this chapter. (Added by Ord. 91-95)

Article 2. Condemnation of Condominium Development Leaseholds

Sections:

38-2.1 Applicability.
38-2.2 Designation of development for acquistion.
38-2.3 Purchase of leased fee interest.
38-2.4 Qualification for purchase.
38-2.5 Deposits by lessees.
38-2.6 Preliminary negotiation required.
38-2.7 Eminent domain trial.

Sec. 38-2.1 Applicability.

This article applies to developments which, at the time of acquisition of the development by the city, are:

(a) Developed into condominium property regimes or occupied by residential lessees under leases of condominium conveyance documents executed before the effective date of this chapter; or

(b) Developed or partially developed into condominium property regimes occupied or to be occupied by residential leases under apartment leases or condominium conveyance documents executed on or after the effective date of this chapter; provided, that 90 percent of the leases to units in the condominium have been executed.

(Added by Ord. 91-95)

Sec. 38-2.2 Designation of development for acquisition.

(a) Subject to subsection (b) of this section, the department may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least 25 of all the condominium owners within the development or at least owners of 50 percent of the condominium units, whichever number is less, apply to the department to purchase the leased fee interest pursuant to Section 38-2.4, and file an application with the department; and

(2) Due notice is given and a public hearing held, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication not being less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part, will effectuate the public purposes of this

chapter. For purposes of this subsection, "condominium owners" means the owner-occupants of the condominium development.

(b) This land designated and acquired by the city may consist of a portion of or the entirety of the land area submitted to the declaration of condominium property.

(Added by Ord. 91-95)

Sec. 38-2.3 Purchase of leased fee interest.

The condominium lessees who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the city within 60 days of acquisition of the interest of the city, the leased fee interest appertaining to their condominiums, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to the lessee's condominium units, subject to the terms, covenants, and conditions of the contract executed with the city. If any lessee refuses to enter into such a contract, then in that event, such lessee shall pay to the city all costs incurred by the city in the acquisition of the appurtenant condominium leased fee interest within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further, that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the condominium. (Added by Ord. 91-95)

Sec. 38-2.4 Qualification for purchase.

(a) No sale of any condominium land within a development shall be made unless the lessees:

(1) Are at least 18 years of age and are owner-occupants of their condominium units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale, have an equitable interest in a condominium situated on the leased property applied for; provided, that for the purpose of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction.

(4) Do not own property in fee simple lands suitable for residential purposes within the City and County of Honolulu or having pending before the state housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse

(unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest, in a land trust in the City and County of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the city promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under HRS Chapter 91, to effectuate the purposes of this section.

(Added by Ord. 91-95)

Sec. 38-2.5 Deposits by lessees.

(a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their condominiums pursuant to this chapter. The means of determining the amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

(Added by Ord. 91-95)

Sec. 38-2.6 Preliminary negotiation required.

(a) Upon the filing with the department of an application by the lessees in accordance with Section 38-2.2(a)(1) of this article, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers

together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of Section 38-2.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the condominium development which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to Section 38-2.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this chapter.

(Added by Ord. 91-95)

Sec. 38-2.7 Eminent domain trial.

The parties to the eminent domain action brought under this chapter shall be the city as plaintiff and the lessees, and the lessors and all other necessary parties

as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired. (Added by Ord. 91-95)

Article 3. Condemnation of Cooperative Housing Development Leaseholds

Sections:

38-3.1 Applicability.
38-3.2 Designation of development for acquistion.
38-3.3 Purchase of leased fee interest.
38-3.4 Qualification for lease or purchase.
38-3.5 Deposits by lessees.
38-3.6 Preliminary negotiation required.
38-3.7 Eminent domain trial.

Sec. 38-3.1 Applicability.

This article applies to developments which, at the time of acquisition of the development by the city, are leased to cooperative housing corporations that sublease individual apartments to residential lessees under proprietary leases executed either prior to or after the effective date of this chapter; provided that ninety percent of the proprietary leases to the cooperative have been executed. (Added by Ord. 91-95)

Sec. 38-3.2 Designation of development for acquisition.

(a) Subject to subsection (b) of this section, the department may designate all of a development for acquisition, and facilitate the acquisition of

the leased fee interests in the development by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after:

(1) The cooperative housing corporation applies to the department to purchase the leased fee interest pursuant to Section 38-3.4 after the cooperative housing corporation receives approval from its shareholders; and

(2) If, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this article will effectuate the public purposes of this chapter.

(b) The development designated and acquired by the city shall consist of the entire land parcel leased to a cooperative housing corporation.

(c) Where the cooperative housing development consists of both residential and nonresidential units, the terms "development," "cooperatives," or similar terms when used in this article, including the provisions on acquisition, disposal, and financing of cooperatives and

developments, shall be construed to apply only to the residential units.

(Added by Ord. 91-95)

Sec. 38-3.3 Purchase of leased fee interest.

The cooperative housing corporation which has applied to the department and which has qualified for purchase of the leased fee interest, shall purchase from the city within 60 days of acquisition of the interest of the city, the entire leased fee interest appertaining to the cooperative subject to the terms, covenants, and conditions of the contract executed with the city; provided, that:

(a) If the cooperative housing corporation refuses to enter into such a contract, then it shall pay to the city all costs incurred by the city in the acquisition of the leased fee interest including, but not limited to, appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect these costs;

(b) In case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the cooperative.

(Added by Ord. 91-95)

Sec. 38-3.4 Qualification for lease or purchase.

(a) No sale of any leased fee interest in a cooperative housing development to a cooperative housing corporation shall be made

unless the cooperative housing corporation satisfies the following requirements:

(1) Submission of proof, in such form as is acceptable to the department, that a majority of the shareholders of the cooperative housing corporation have approved or ratified the purchase of the leased fee interest of the development;

(2) Submission of a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the cooperative housing corporation will be able to promptly pay the city for the leased fee interest;

(3) Submission of an application for purchase of the leased fee interest in good faith, and in such form as is acceptable to the department;

(4) Execution of a contract for the purchase of the leased fee interest in such form as is acceptable to the department; and

(5) Submission of proof, in such form as is acceptable to the department, that at least 60 percent of the cooperative housing corporation consists of owner-occupant-shareholders of residential units within the affected cooperative housing development.

(b) In the event of a wilful breach of contract by the cooperative housing corporation, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection

with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under HRS Chapter 91 to effectuate the purposes of this section.

(Added by Ord. 91-95)

Sec. 38-3.5 Deposits by lessees.

(a) The department may require the submission of a deposit by the cooperative housing corporation applying to the department for the purchase of the leased fee interest pursuant to this chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for those deposits under this section.

(Added by Ord. 91-95)

Sec. 38-3.6 Preliminary negotiation required.

(a) Upon the filing of a petition by the cooperative housing corporation with the department, the

department shall request the lessor and the cooperative housing corporation to negotiate the just compensation which the cooperative housing corporation will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the cooperative housing corporation will be able to meet the financial requirements of Section 38-3.4(a)(2).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting the qualification amounts pursuant to Section 38-3.4(a)(2) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse

party in any action, suit, or proceeding brought under this chapter.

(Added by Ord. 91-95)

Sec. 38-3.7 Eminent domain trial.

The parties to the eminent domain action brought under this chapter shall be the city as plaintiff and the cooperative housing corporation, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired. (Added by Ord. 91-95)

Article 4. Condemnation of Residential Planned Development Leaseholds

Sections:

38-4.1 Applicability.
38-4.2 Designation of development for acquistion.
38-4.3 Purchase of leased fee interest.
38-4.4 Qualification for purchase.
38-4.5 Deposits by lessees.
38-4.6 Preliminary negotiation required.
38-4.7 Eminent domain trial.

Sec. 38-4.1 Applicability.

This article applies to residential planned developments which, at the time of acquisition of the development by the city, are:

(a) Developed into residential planned developments and occupied by residential lessees under apartment leases or planned

development conveyance documents executed before the effective date of this chapter; or

(b) Developed or partially developed into such planned developments occupied or to be occupied by residential lessees under apartment leases or planned development conveyance documents executed on or after the effective date of this chapter; provided, that 90 percent of such leases to the planned unit development have been executed.

(Added by Ord. 91-95)

Sec. 38-4.2 Designation of development for acquisition.

(a) Subject to subsection (b) of this section, the department may designate all or a portion of the land beneath a planned development containing residential units for acquisition, and facilitate the acquisition of the applicable leased fee interests in such land by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least 25 of all the owners within the development or at least owners of 50 percent of the residential units, whichever number is less, of all the owners within the planned development apply to the department to purchase the leased fee interest pursuant to Section 38-4.4, and file the application with the department; and

(2) Due notice and public hearing, the time and place of which have been duly

advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this section will effectuate the public purposes of this chapter. For purposes of this subsection, "owners," as used in subsection (a)(1) of this section means the owner-occupants of the planned developments.

(b) The land designated and acquired by the city may consist of a portion of or the entire land area submitted to the declaration of planned development.

(Added by Ord. 91-95)

Sec. 38-4.3 Purchase of leased fee interest.

The planned development lessees, who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the city within 60 days of acquisition of the interest by the city, the leased fee interest appertaining to the planned development unit, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to their units, subject to the terms, covenants, and conditions of the contract executed with the city; if any lessees refuse to enter

into such contract, then in that event, those lessees shall pay to the city all costs incurred by the city in the acquisition of the relevant planned development within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided, further, that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the planned development. (Added by Ord. 91-95)

Sec. 38-4.4 Qualification for purchase.

(a) No sale of any leased fee interest in land under a residential planned development land shall be made unless the lessees:

(1) Are at least 18 years of age and are owner-occupants of their residential planned units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale an equitable interest in a planned unit development situated on the leased property applied for; provided, that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the City and County of Honolulu or have pending before the state housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands pursuant to this chapter, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the City and County of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the city promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees of the residential planned development, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this section shall be conclusive to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under HRS Chapter 91, to effectuate the purposes of this section.

(Added by Ord. 91-95)

Sec. 38-4.5 Deposits by lessees.

(a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their planned development housing unit pursuant to this chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

(Added by Ord. 91-95)

Sec. 38-4.6 Preliminary negotiation required.

(a) Upon the filing of a petition by the lessees with the department, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of Section 38-4.4(a)(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of the action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving the value of the lessor's interest in the land beneath the planned development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualifications amounts pursuant to Section 38-4.4(a)(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development and were not prepared for use in the trial, shall not be discoverable,

usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this chapter.

(Added by Ord. 91-95)

Sec. 38-4.7 Eminent domain trial.

The parties to the eminent domain action brought under this chapter shall be the city as plaintiff and the lessees, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired. (Added by Ord. 91-95)

Article 5. Eminent Domain

Sections:

38-5.1 Applicability.
38-5.2 Exercise of power of eminent domain.
38-5.3 Compensation.
38-5.4 Interest acquired.
38-5.5 Interest in compensation paid by the city.
38-5.6 Compulsory or involuntary conversion.

Sec. 38-5.1 Applicability.

This article applies to developments which are created by condominium property regimes under HRS Chapter 514A, and to developments existing under cooperative housing corporation status, and to

residential planned developments not covered by HRS Chapter 516. (Added by Ord. 91-95)

Sec. 38-5.2 Exercise of power of eminent domain.

Within 12 months after the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development of the City and County of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire the leased fee interest or portion thereof so designated. If the leased fee interest is not acquired or eminent domain proceedings are not instituted within the 12 month period, the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of land so designated for actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation. (Added by Ord. 91-95)

Sec. 38-5.3 Compensation.

The compensation to be paid for the leased fee interest shall be the current fair market value of the leased fee interest. The compensation shall be determined as of the date of the summons of the complaint in eminent domain. (Added by Ord. 91-95)

Sec. 38-5.4 Interest acquired.

(a) Upon acquisition of a development or portion thereof as provided in this article, the property interest acquired by the city is all of the right, title, and interest of the fee owner, and of the

lessor and fee owner and all legal and equitable owners, if any besides the lessor, in and to the development or portion thereof acquired, subject to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential condominium or cooperative housing corporation leases, which are not inconsistent with the intent of this article. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the apartment lease, condominium conveyance document, or proprietary lease is subject to any leasehold mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee in no manner shall affect or impair such mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to the extent necessary to avoid any impairment of the leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance in writing consents to the transfer thereof to the

fee and merger as provided in this chapter. Upon written consent by the holder thereof, each leasehold mortgage, lien, or encumbrance to which the apartment lease, condominium conveyance document or proprietary lease is subject and to which the consent refers shall be transferred to and shall bind the fee acquired by the lessee, and thereafter shall continue in full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

(Added by Ord. 91-95)

Sec. 38-5.5 Interest in compensation paid by the city.

The lessor, the fee owner, and all legal and equitable owners shall share in the compensation paid by the city as their respective interest shall appear. Notwithstanding any provision to the contrary in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in the compensation paid by the city to the extent of the persons's interest as may be determined by agreement of those entitled to share in the compensation paid by the city and in the absence of such agreement pursuant to HRS Chapter 658. (Added by Ord. 91-95)

Sec. 38-5.6 Compulsory or involuntary conversion.

It is the intent of the council, within the meaning of Section 1033 or Section 1231 of the Internal Revenue Code or the applicable provisions of HRS Chapter 235, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the city under this section shall constitute a compulsory or involuntary conversion, as a result of the exercise of the power of condemnation or the threat of imminence thereof, and that the fee owner shall not, by reason in whole or in part of any provision of this chapter or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this chapter, be deemed to hold the property primarily for sale to customers in the ordinary course of trade or business. (Added by Ord. 91-95)

Article 6. Revolving Fund

Section:

38-6.1 Fee simple condominium and cooperative and planned unit development revolving fund.

Sec. 38-6.1 Fee simple condominium and cooperative and planned unit development revolving fund.

A fee simple condominium and cooperative and planned unit development revolving fund is created.

The funds appropriated for the purposes of this chapter and all moneys received or collected by the department of housing and community development under this chapter shall be deposited in the revolving fund. The proceeds in the fund shall be used for the necessary expenses of the department, including administration, under this chapter. All interest earned on moneys deposited by lessees into this revolving fund shall accrue to the lessees. (Added by Ord. 91-95)

APPENDIX G

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

ORDINANCE 05-001

BILL 53 (2004), CD1, FD1

A BILL FOR AN ORDINANCE

RELATING TO LEASEHOLD CONVERSION.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Findings and Purpose.

The council finds that:

Since the enactment of Chapter 38, Revised Ordinances of Honolulu 1990 ("Chapter 38), the issue of mandatory leasehold conversion has been a highly contentious issue that has divided the community.

The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ("Charter") states: "The council shall by resolution determine and declare the necessity of taking property

for public purposes, describing the property and stating the uses to which it shall be devoted." Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.

The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists "runaway land prices," "shortage of fee simple residential condominiums," "artificial inflation of land values," "lessees forced to accept long-term leases . . . which contain terms and conditions which are financially disadvantageous to them," "land values, artificially inflated by concentrated or single ownership," and "potential for economic instability and disruption on Oahu" as public purposes furthered by Chapter 38.

The council finds that mandatoty conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38

do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.

Finally, "there is no vested right in a public law which is not in the nature of a private grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it. . . . No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit." *In re Application of Herrick,* 93 Hawai'i 329, 338 (1996).

Based on the foregoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

Thus, the purpose of this ordinance is to repeal Chapter 38, Revised Ordinances of Honolulu 1990, concerning leasehold conversion.

SECTION 2. Chapter 38 ("Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion"), Revised Ordinances of Honolulu 1990, is repealed.

SECTION 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance. "Development" means the same as defined under Section 38-1.2, ROH, on the day before the effective date of this ordinance. "Valid designation" means a designation of specific units in a development for leasehold conversion and subsequent approval for condemnation by the council that complied with Chapter 38, ROH, as existing on the day before the effective date of this ordinance and construed by the Hawaii Supreme Court in *Coon v. City and County of Honolulu*, 98 Haw. 233, 47 P.3d 348 (2002).

(b) Any designation of a development for leasehold conversion shall be invalid on the effective date of this ordinance if the council did not authorize before the effective date of this ordinance the eminent domain proceeding to acquire all or a portion of the leased fee interests to the development.

SECTION 4. This ordinance shall not affect any reimbursement for actual out-of- pocket expenses that may be owed a fee owner, lessor, or legal and equitable owner of a designated development pursuant to Section 38-5.2, ROH, for the failure by the city, within 12 months of the designation, to acquire the applicable leased fee interests to the development or institute eminent domain proceedings to acquire such interests. Any entitlement to reimbursement shall be subject to Chapter 38, ROH, including Section 38-5.2, ROH, as existing on the day before the effective date of this ordinance. This section shall apply whether the expiration of the 12-month period occurs prior to, on, or after the effective date of this ordinance. This section shall also apply to any development, the designation for which is invalidated as a result of Section 3(b) of this ordinance before the expiration of the 12-month period of Section 38-5.2, ROH.

SECTION 5. This ordinance shall take effect upon its approval.

INTRODUCED BY:

Mike Gabbard

Councilmembers

DATE OF INTRODUCTION:

August 2, 2004
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

/s/
Deputy Corporation Counsel

APPROVED this 9th day of February, 2005.

/s/
MUFI HANNEMANN, Mayor
City and County of Honolulu

[Certificate Omitted in this Appendix]

APPENDIX H

LEASED FEE INTEREST PURCHASE CONTRACT

DEPOSIT

The City and County of Honolulu acknowledges the receipt of the sum of $1,000.00 paid to it by the Buyer, or on behalf of the Buyer, named below.

OFFER AND ACCEPTANCE:

1. City: The City and County of Honolulu, a municipal corporation of the State of Hawaii ("City") is the entity authorized to convey the leased fee interest in the Real Property on which the condominium project described below is situated to the buyer. The principal place of business and mailing address of the City is Honolulu Hale, 530 South King Street, Honolulu, Hawaii 96813.

2. BUYER: The Buyer is RALPH JAMES MITCHELL and LUCY ELIZABETH MITCHELL, husband and wife, ("Buyer"), whose residence and mailing address is 1778 ALA MOANA BOULEVARD, APARTMENT 804, HONOLULU, HAWAII 96815.

3. UNIT: The subject of this agreement is the leased fee interest appurtenant to unit number 804, the residential apartment subject to a Declaration of Condominium Property Regime as defined in Hawaii Revised Statutes Chapter 514A ("Unit") in the

condominium project known as DISCOVERY BAY ("Project").

4. AGREEMENT TO CONVEY AND ACCEPT CONVEYANCE: The Buyer agrees to accept from the City, and the City agrees to convey to the Buyer, the Property on the terms stated in this Leased Fee Interest Purchase Contract ("Agreement").

5. INTEREST TO BE ACQUIRED: The City shall convey to the Buyer by Quitclaim Deed (a) all of its right, title and interest in (i) the Unit and all limited common elements appurtenant to the Unit, and (ii) the undivided percentage interest in the real property and other common elements upon which the Unit is situated and b) all of its right, title and interest in Buyer's Condominium Conveyance Document ("Condominium Conveyance Document") of the Unit and the real property ("Property"). The Buyer shall not be in default of any of the terms stated in the Condominium Conveyance Document for the Property on the Closing Date.

6. PURCHASE PRICE: The purchase price for the Property, together with any blight of summons or other damages awarded to the owner of the fee simple interest in the real property, will be determined by the Court before which is conducted the trial of the condemnation action initiated by the City by the exercise of its power of eminent domain or it will be the amount agreed to by the Buyer and the owner of the fee simple interest in the real property ("Purchase Price"). The Buyer shall execute an amendment or amendments to this Agreement, when requested to do so by the City, to state the Purchase Price when it is

determined pursuant to the provisions in this paragraph.

7. PAYMENT OF PURCHASE PRICE: The Buyer shalt pay the Purchase Price to the City in full in cash. A portion of the Purchase Price may be obtained from a lender. The Buver's lender (if known) is:
American Savings Bank

8. TITLE AND TENANCY: The Title to the Property will vest in the Buyer in the same manner as the lease of the Property is held by the Buyer as stated in the Buyer's Condominium Conveyance Document unless a change in that tenancy is requested by the Buyer as indicated by the Buyer's checking the appropriate box below:

[ ] Severalty [ ] Tenants by the Entirety
[ ]Joint Tenants [ ] Tenants in Common
[ ]Other: _____

9. CLOSING: The closing date ("Closing Date") will be determined by the Buyer and the City, but in no event shall the Closing Date be later than 60 days after the City acquires the Property.

10. ESCROW: The escrow company for this transaction will be determined by the Buyer and the City prior to the Closing Date. The Escrow which shall act in accordance with Escrow Instructions executed by the Buyer and the City.

11. PRORATIONS: Lease rent will be prorated as of the date that the document conveying title to the Property to the City is recorded in the Bureau of

Conveyances, State of Hawaii and/or with the Assistant Registrar of the Land Court of the State of Hawaii.

12. ADDITIONAL TERMS: Exhibit A states additional terms of this Agreement which exhibit is attached to this Agreement and made a part of it.

THE BUYER AND THE CITY executed this Agreement on the date stated beside their signatures, below.

June 4th, 2004 /s/
RALPH JAMES MITCHELL

June 4th, 2004 /s/
LUCY ELIZABETH MITCHELL

CITY AND COUNTY OF HONOLULU

6-08, 2004 By: /s/
Its: Director of the Department of Community Services

THIS IS A LEGALLY BINDING CONTRACT, READ IT CAREFULLY

Approved as to form and legality by the
Department of the Corporation Counsel,
City and County of Honolulu
dcl:7/24/98:leased fee interest purchase contract

EXHIBIT A

ADDITIONAL TERMS

1. QUITCCLAIM DEED: Title will be conveyed by Quitclaim Deed from the City to the Buyer. The Quitclaim Deed will be prepared by the City.

2. EXECUTION OF INSTRUMENTS: The Buyer agrees to execute all instruments necessary to close this transaction requested by the City or the Escrow.

3. BUYER'S INSPECTION AND SATISFACTION: The Buyer represents to the City that, as of the Closing Date, the Buyer will know, will have examined, and will have investigated, to the full and complete satisfaction of the Buyer, the physical nature and condition of the Property, or the Buyer, by the Closing Date will be deemed to have waived such knowledge, examination, and investigation.

The Buyer further acknowledges that neither the City nor any agent, attorney, appointee, employee or representative of the City has made any representation whatsoever regarding the Property or any part thereof, not stated in this Agreement, including without limiting the generality of the foregoing, any representations as to: (i) the condition of the Property; (ii) the value of the Property; (iii) the suitability of the Property for the Buyer's intended use or for any use whatsoever; (iv) any applicable building, fire, or zoning laws, codes, or regulations, or compliance with them; (v) the existence of or compliance with any required permits, certificates, or licenses issued by any governmental agency; (vi) any

warranty as to the structural, mechanical, plumbing, electrical, or air conditioning systems of the Property; (vii) the existence or absence of any hazardous materials; or (viii) the accuracy or validity of any documents furnished to the Buyer.

The Buyer agrees that the Buyer has relied and will be relying solely on the Buyer's own inspection, examination, and investigation, and will review all aspects of the Property pertaining to the matters stated above in this paragraph. The Buyer assumes the risk that adverse physical conditions may not have been revealed by its own investigations and examinations. The Buyer further assumes the risk of all changes in zoning, land use, ordinances, rules, regulations and adverse governmental actions of any kind that might affect the Property or the Buyer's intended use of the Property.

The Buyer agrees to Purchase the Property on the Closing Date in "AS IS, WHERE IS" condition, and "WITH ALL FAULTS". The Buyer's agreements and representations above in this paragraph shall survive the Closing Date.

4. BUYER'S UNDERSTANDING: By executing this Agreement, the Buyer understands and agrees:

A. This Agreement is expressly conditioned upon the City's successful acquisition of the Property through the exercise of the power of eminent domain, and that failure of the City to acquire the Property, through no fault of the Buyer, will render this contract null and void without further action by either the Buyer or the City; and

B. The City has relied on, and will continue to rely on, all information, representations, statements and agreements made by Buyer in the Application to Purchase Lease Fee Interest and all attachments and updates thereto submitted to the City, ("Application") which Application is incorporated into this Agreement by reference and made a part of it.

5. ORDINANCE AND RULES: All of the terms and conditions of Chapter 38, Revised Ordinances of Honolulu ("Ordinance") and the Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion, as amended ("Rules") promulgated by the City Department of Housing and Community Development and amended by the City Department of Community Services which currently administers the implementation of Chapter 38 ROH are incorporated by reference into this Agreement and made a part of it. The Ordinance and the Rules are binding on the Buyer and the City. In the event of any conflict between any provisions stated in the Ordinance and the Rules and this Agreement, the provisions contained in the Ordinance and the Rules shall control without invalidating or altering the remaining provisions of this Agreement.

6. BUYER'S INDEMNIFICATION; GENERAL: The Buyer agrees to indemnify, defend, and hold the City harmless against and from:

A. Any and all liabilities, obligations, and claims against the City, its employees, appointees, attorneys, agents, successors, and assigns which pertain to the Property, resulting from the acts of the City, its elected officials, administrative staff, appointees, employees,

attorneys, agents, consultants, successors, and assigns both prior and subsequent to the consummation of this transaction on the Closing Date, provided that such acts are authorized acts in connection with the acquisition of the leased fee interest appurtenant to the Unit pursuant to Chapter 38, Revised Ordinances of Honolulu 1990;

B. Any and all actions, suits, proceedings, demands and judgements, including all costs, expenses, and reasonable attorneys' fees incurred with respect to any of the foregoing.

The Buyer's agreements and representations above in this paragraph 6, shall survive the Closing Date.

7. BUYER'S INDEMNIFICATION: HAZARDOUS MATERIALS: The Buyer agrees to indemnify, defend, and hold the City, its successors and/or assigns harmless for any liability, costs damages, or other losses relating to or arising out of the Property's contamination with hazardous materials and for any liability for the removal of contaminants or remedial action which is necessary due to the contamination of soil, surface water or ground water at or underlying the Property.

A. The term "contamination" means toxic or hazardous materials which have been deposited, stored, or placed at the Property, or have otherwise come to be located on, in or under the soil, air, surface water, or ground water at the Property.

B. The term "removal of contaminants" or "remedial action" means the removal, treatment, or

disposal and/or other appropriate disposition of contaminated soils, surface water, or ground water at the Buyer's sole cost and expense.

C. The terms: (a) "contaminant", and (b) "toxic or hazardous material" means any substance that is at any time defined or listed in, or otherwise classified pursuant to any applicable laws or regulations (including without limitation, environmental laws), as a hazardous substance, hazardous waste, infectious waste, toxic substance, toxic pollutant, or regulated substance.

D. This indemnity shall apply to all removal or remedial actions as may be required by a governmental agency with jurisdiction over the matter.

The Buyer's agreements and representations above in this paragraph 7, shall survive the Closing Date.

8. PAYMENT OF COSTS: The Buyer shall pay all costs connected with the purchase of the Property inchding, but not limited to, title insurance, escrow fees, document preparation fees, recording fees, conveyance tax, notary fees, property manager transfer fees, if any, a prorata share of all attorneys' fees and costs, court costs, allocated costs as defined in the Ordinance and the Rules, appraisers' fees, blight of summons damages, if any, and all other fees and costs whatsoever. The deposit made by or on behalf of the Buyer referred to above will be used by the City to pay a prorata share of expenses incurred by the City pursuant to the Ordinance and the Rules and any excess will be delivered to the Escrow by the City to be credited by the Escrow toward the Purchase Price.

9. TIME OF THE ESSENCE; REMEDIES: Time is of the essence in this transaction. Upon the occurrence of any of the following events, this Agreement may be terminated by the City, in its sole and absolute discretion, by written notice of the termination to the Buyer, and all payments made by the Buyer, except funds delivered to the Escrow by the Buyer's lender which will be returned to that lender, will be returned to the Buyer reduced by the expenses incurred including, but not limited to, a proportionate share of all allocated costs as defined in the Ordinance and the Rules, escrow fees, and title cancellation fees. Termination of this Agreement by the City will be without prejudice to any legal claims and remedies available to it against the Buyer.

A. The failure of the Buyer to submit any required documentation to the City satisfactory to the City within the applicable period of time pursuant to the Ordinance or the Rules;

B. The failure of the Buyer to deliver the Purchase Price to the Escrow as stated in this Agreement;

C. The failure of the Buyer to meet any other obligation which the Buyer is required to meet as stated in this Agreement;

D. The successful negotiation by the Buyer with the lessor/fee owner for the purchase of the Property prior to the filing of a condemnation action by the City.

10. RECOVERY OF COSTS: The prevailing party shall be entitled to recover all costs incurred from any

action or proceeding initiated pursuant to this Agreement, including reasonable attorneys' fees.

11. PRELIMINARY REPORT; REMEDIES: Prior to the Closing Date, the City shall furnish the Buyer with a Preliminary Title Report for the interest which is to be conveyed to the Buyer. If the City fails to deliver the Preliminary Title Report, the Buyer, at its option, may terminate this Agreement without prejudice to any legal claims and remedies arising in favor of either party on account of failure of the other party to perform as required by this Agreement. Termination of this Agreement by the Buyer will be without prejudice to any legal claims and remedies available to it against the City.

12. MISCELLANEOUS PROVISIONS:

A. Amendment. The provisions of this instrument may be amended only by each party executing a subsequent written instrument which states each amended provision.

B. Assignment. Neither the entire agreement which is stated in this instrument nor any interest in it may be assigned by any party for any purpose without the prior written consent of each party.

C. Applicable Law. The provisions of this instrument shall be interpreted in accordance with the law of the State of Hawaii as that law is construed and amended from time to time.

D. Authorization. Each party warrants to each other party that the individuals executing this instrument are authorized to do so.

E. Binding Effect. Upon its execution by each party, this instrument shall become binding and enforceable according to its provisions. If more than one party is obligated to perform an act by any provisions stated in this instrument, those parties shall be jointly and severally liable and obligated for the performance of those acts. The rights and obligations of each party named in this instrument shall bind and inure to the benefit of each party, respectively, and the respective heirs, personal representatives, successors, and assigns of each party.

F. Consent, Subsequent Agreement. If a subsequent consent required of any party by the provisions of this instrument is requested by a party, it shall not be unreasonably withheld by the party to whom the request is made.

G. Construction. Each party named in this instrument acknowledges and agrees that (i) each party is of equal bargaining strength; (ii) each party has actively participated in the negotiation and preparation of this instrument; (iii) each party has consulted with their respective legal counsel and other professional advisors as each party has deemed appropriate; (iv) each party and the party's legal counsel and advisors have reviewed this instrument; and (v) each party has agreed to be bound by the terms stated in this instrument following its review and obtaining advice.

H. Counterparts. This instrument may be executed by the parties in counterparts. The counterparts executed by the parties named in this instrument and properly acknowledged, if necessary, taken together, shall constitute a single instrument.

I. Dates. If any dates stated in this instrument fall on a Saturday, Sunday, or legal holiday, such date shall be the next following business day.

J. Defined Terms. Certain terms where they initially are used in this instrument are set off by quotation marks enclosed in parentheses and are subsequently capitalized. Those designated terms shall have the same meaning throughout this instrument, unless otherwise specifically stated or clearly inappropriate in the context.

K. Force Majeure. If any party is prevented from performing its obligations stated in this instrument by any event not within the reasonable control of that party, including, but not limited to an act of God, public enemy, or war, fire, an act or failure to act of a government entity (except on the part of the City), unavailability of materials, or actions by or against labor unions, it shall not be in default in the performance of its obligations stated in this instrument. PROVIDED, HOWEVER, any party delayed by such an event shall request an extension of time to perform it obligations stated in this instrument by notifying the party to which it is obligated within ten days following the event. If the notified party agrees that the event was the cause of the delay, the time to perform the obligations stated in this instrument shall be extended by the number of days of

delay caused by the event. If the required notice is not given by the delayed party, no time extension shall be granted.

L. Gender; Number. In this instrument, the use of any gender shall include all genders and the use of any number in reference to nouns and pronouns shall include the singular or plural, as the context dictates.

M. Integration. This instrument contains all of the provisions of the agreement between the parties pertaining to the subject matter stated in this instrument. Each party acknowledges that no person or entity made any oral or written representation on which a party has relied as a basis to enter into the agreement stated in this instrument which is not included as a provision in it.

N. Memorandum. If required by the provisions of this instrument or requested by any party, a memorandum of this instrument shall be executed by the parties, the signatures properly acknowledged by a Notary Public, and recorded in the Bureau of Conveyances, State of Hawaii.

O. No Drafter. No party shall be deemed to have drafted this instrument. No provision stated in this instrument shall be construed against any party as its drafter.

P. No Offer. The provisions stated in this instrument shall not bind any party until each party has executed it. The mere delivery of this instrument is not an offer.

Q. No Obligations to Third Parties. Unless there is a provision stated in this instrument to the contrary, the execution and deliveryof this instrument shall not confer rights on any person or entity except the parties, or obligate any party to any person or entity except another party.

R. Notice. Any notice required or permitted by the provisions of this instrument to be given by a party to any other party shall be written and either shall be delivered personally or mailed postage prepaid by certified mail, return receipt requested, to each other party at the address and to the person designated by each party, stated below. No other method of notice shall be effective.

(1) CITY AND COUNTY OF HONOLULU:
DEPARTMENT OF COMMUNITY SERVICES
848 SOUTH BERETANIA STREET
SUITE 306
HONOLULU, HAWAII 96813

(2) RALPH J. MITCHELL
LUCY E. MITCHELL
1778 ALA MOANA BOULEVARD
APARTMENT 804
HONOLULU, HAWAII 96815

S. Paragraph Titles. The titles of provisions stated in this instrument are included only for the convenience of the parties. They shall not be considered in the construction of the provisions stated in this instrument.

T. Required Action by the Parties. Each party named in this instrument agrees to execute the instruments and to diligently undertake the acts necessary to consummate the transaction contemplated by this Agreement. Each party shall use its best efforts to consummate the transaction contemplated by this instrument.

U. Severability. If any provision stated in this instrument subsequently is determined to be invalid, illegal, or unenforceable, that determination shall not affect the validity, legality, or enforceability of the remaining provisions stated in this instrument unless the effect is made impossible by the absence of the omitted provision.

V. Survival. Any representation and warranty stated in this instrument made by a party shall survive the termination of the agreement stated in this instrument, unless otherwise specifically stated.

W. Required Actions of Buyer and City. Buyer and City agrees to execute such instruments and documents and to use their best efforts to perform the actions required in order to consummate the transaction contemplated by this instrument

X. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto (as permitted pursuant to the provisions of this Agreement).